AMERICAN BAR ASSOCIATION
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Meeting of the Executive Committee

The Executive Committee of the American Bar Association will hold its mid-winter meeting in Tampa, Fla., beginning January 9 and continuing in session for several days. At the last annual meeting in Cincinnati an invitation to come to Tampa was extended by the local Bar Association. A special program for the entertainment of the committee and others in attendance, between the business sessions, has been prepared by the local committee. It will include an address of welcome by Hon. Jefferson B. Browne, Chief Justice of the Supreme Court of Florida, and visits to various near-by points of interest.

On January 7 at the same place there will be a meeting of the Executive Committee of the National Conference of Commissioners on Uniform State Laws.

Action Follows Cleveland Survey

Since publication of the results of the Cleveland Survey, the "Cleveland Association for Criminal Justice" has been formed by duly accredited representatives of the Cleveland Bar Association, the Cleveland Chamber of Commerce, and ten other leading civic and business organizations of the city. The organization was perfected on November 30, 1921, by the adoption of articles of association which declared that "the purpose of the association shall be to promote and secure an intelligent and efficient administration of criminal justice in Cuyahoga County, Ohio, through constructive and helpful cooperation with all officers, departments and tribunals charged with the administration thereof." Provision is made for a board of directors, executive committee, advisory committee and officers of the association. Membership is divided in three classes—active, auxiliary and associate. The first is to be composed of organizations performing such civic functions or having such aims or possessing such membership as fit them particularly for the work in hand; the second consists of organizations or associations whose interest in the general purpose is such as to entitle them to membership in the opinion of the board of directors; and the third is composed of individuals who are interested in the purpose of the organization. The association shall continue for a full period of five years from January 1, 1922, unless it is earlier dissolved by a three-fourths vote of the board of directors, and for such further period as may be determined by the board of directors from time to time.

Economic and Social History of the World War

An economic and social history of the world war is being prepared under the direction of the Carnegie Endowment for International Peace. In the 1921 report of that institution Prof. James T. Shotwell, general editor, gives an interesting account of the progress of the work to date. An editorial board has been chosen in each of the larger countries and special editors have been nominated in the smaller ones to concentrate, for the present at least, on the economic and social history of their own countries. The list of those who have accepted the responsibility of editorship includes men distinguished in scholarship and public affairs in the various nations. Once the editorial organization was established, the first step to be taken toward the actual preparation of the history was obviously to secure an idea of the documents which furnish essential records of the war. In every country, therefore, this has been the point of departure for actual work, and much progress is being made toward surveying the situation and reporting findings in the forms of guides or manuals to the archives.

Unfortunately a vast mass of source material essential for the historians was labeled "secret" during the war by government officials and thus is likely to be for some time to come beyond the reach of investigation. But while such conditions

must hamper research, an alternative has been found in the narrative, "amply supported by documentary evidence, of those who had played some part in the conduct of affairs during the war, or who, as close observers in privileged positions, were able to record from first or at best second-hand knowledge the history of different phases of the great economic war and its effect upon society. Thus a series of monographs was planned, consisting for the most part of unofficial yet authoritative statements, descriptive or historical, which may best be described as about half way between memoirs and blue books. These monographic studies make up the main body of the work assigned so far." In addition, a number of studies by specialists dealing with technical or limited subjects, historical or statistical, are in the course of preparation. "To quote an apt characterization," says Director Shotwell, "in the first stages of a history like this we are 'only picking cotton.' The tangled threads of events have still to be woven into the pattern of history; and for this creative and constructive work different plans and organizations may be needed."

The outline of the plan covers twenty pages in the annual report of the Endowment and gives a definite idea of the thoroughness and scope with which this great work is being prosecuted.

Chili, Peru, and Cincinnati

At the banquet of the American Bar Association at Cincinnati the Peruvian Ambassador made an appeal for the formation of an American public opinion with reference to what he termed the "problem of the Pacific"—by which he meant the contention between Peru and Chili over the Tacna-Arica question. In eulogizing the Monroe Doctrine, he called attention to the fact that oppression on this continent might come from within as well as from without, as, for instance by the "spoliation of one American Republic by another. . . . After nearly forty years since the ending of the war of the Pacific," he continued, "a condition exists in the South American continent that is well worth the consideration of every thinking man. A great wrong exists even today. Nations were attacked and territories were conquered by force of arms. Treaty stipulations were forced practically at the point of the bayonet and their terms have been ignored. After nearly forty years, two nations in South America still hear the vae victis, while the oppressor who retains territory seized, surrendered or conquered as a consequence of war, aggression and conquest against the protest of their inhabitants who have never for one moment conformed to the new condition, arms himself beyond all needs, and maintains throughout the continent a state of militarism which is Prussian in all essentials and details."

The territories in question were occupied by Chili as a consequence of her victory over forty years ago, with the understanding that a plebiscite should be held after ten years to determine which nation should have them, which term was later extended. Various suggestions for friendly mediation by South American nations have been made but have come to nothing. The American State Department recently announced that it would take no part in the controversy.

Shakespeare in Court

The King's Bench Division has recently decided that the London County Council has no authority to defray out of the funds under its control the cost of hiring a theatre or providing actors for the purpose of presenting Shakespearean plays to children in public elementary schools. The decision turned on the question whether the theatre was one of the "places of educational value or interest" visits to which were authorized to be counted as part of school attendance. The Lord Chief Justice declared that, while the authorities were perfectly entitled to take children to such a place, the court did not think that it fell within the meaning of the words just quoted. He cited the House of Commons, Westminster Abbey, the Guild Hall, the Tower of London as places of educational value or interest in London but inquired, "is it possible to say that the attendance of children at the performance of a play and at a theatre comes within the fair interpretation of the words?" In brief, what the Council was authorized to do was to permit children to visit such places, but not to go to the extent of providing the place and providing the actors and actresses who give the performance. "This is what in fact the Council are doing," he continued, "for, as above stated, they hire the theatre or hall in question and pay the actors to perform the play. The theatres and halls are situated in various parts of London, in Hackney, Stoke Newington, Chelsea, Battersea, Hammersmith, Balham, Tooting, Woolwich, Euston, Paddington, New Cross, and Lewisham. No doubt these theatres and halls are admirably suited for the purpose, but we cannot say that the theatres and halls themselves apart from the performances are places of educational value or interest. After all, 'the play's the thing.' "

Powers of Labor Board

Commenting on the temporary injunction recently granted by Federal Judge Landis against the Labor Board, on petition of the Pennsylvania Railroad, R. M. Barton, Chairman, issued a statement to the effect that he welcomed any judicial proceedings that would define and set the proper limitations of the board's power. "There are two conflicting views as to the proper construction and effect of the labor section of the Transportation Act," he said. "One is that the board has only advisory powers and that its decisions can only be made effective so far as they are approved and enforced by public opinion. The other is that they are legally binding and can be enforced through the courts. While this is a debatable question, I hold to the latter view."

SIGNED ARTICLES

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

THE ATTACK ON AMERICAN INSTITUTIONS

Present Duty and Peculiar Privilege of the Bar to Conduct Propaganda in Support of Constitutional Principles which Various Influences Are Endeavoring to Undermine

By Cordenio A. Severance
President of the American Bar Association

PRESIDENT SEVERANCE of the Bar Association delivered the Annual Address before the State Bar Association of Kansas at the meeting in Hutchinson on November 21st. After speaking feelingly of two deceased members of the Kansas Bar Association who had been his friends, the late W. H. Rossington and the late Judge William C. Hook, he discussed at some length various measures of reform in procedure, and asked the support of the Kansas Association for legislation now pending in Congress for an increase in the personnel of the Federal Judiciary. He concluded his address as follows:

While in the ways indicated and in many others, we may perform a real public service in speeding up the administration of justice and rendering it more simple and inexpensive, there is a present duty resting upon the Bar that far transcends it in importance. From a period antedating the world war there has been carried on in this country through various organizations, in certain papers and magazines, and more unfortunate still, by a substantial number of the teaching force in our schools and universities, a propaganda against the institutions under which we live, and particularly directed against the limitations in the federal and state Constitutions. This propaganda has been a curious as well as a dangerous one. As far as can be determined from the out-givings of various persons and organizations it has been at the same time communistic and anarchistic. The same men and bands of men demand in one breath a government operating all means of production, which, to function intelligently and practically, would have to be a strong government, and at the same time declare themselves superior even to the reasonable restraints of the laws existing under the limited government we now have.

The authors of this propaganda proceed in various ways, but in all cases through persistent attacks upon existing conditions. Sometimes the attack is open; other times covert. It may be in the form of direct denunciation or sinister suggestion, the latter being more commonly employed by the half-baked so-called educator in the schools who bumptiously declares himself to be an investigator or seeker after truth. Having elevated himself into that high-sounding position, his lectures are full of suggestive queries as to whether in fact things are right as they exist. Some such teachers argue for socialism; others for a legislature uncontrolled by the courts. One college professor, while occupying an important chair in a great university, wrote a book not long ago in which, in addition to radical economic views, he devoted one chapter to the question as to whether in fact the marriage relation as it has existed for ages is not fundamentally wrong; and in another chapter queried as to whether the Christion religion was not man-made and out of date. I have no objection to this gentleman's entertaining these views or raising these queries in his own mind, or arguing them with adults, but I do seriously object to having him paid a salary to inject these questions into the unformed minds of the coming generation. It must never be forgotten that the vicious teaching of German writers and professors produced after a generation the unprovoked attack upon the free countries of the world, and transformed a land of poetry and music filled with the gentle, liberty-loving type of people who came to your state and mine from Germany in the middle of the last century, into the barbarous hordes who overran and devastated the fields of Flanders and Northern France. When it is proposed to substitute a more old-fashioned scholar in a university or college for a gentleman such as the one I have mentioned, we are at once met, in so-called radical circles, with the charge that free discussion is being stifled, and that old truths, whose value has been proved by age-long experience, cannot stand debate.

The case I have cited is naturally an isolated and uncommon one, but the so-called intellectuals who are assailing, in magazines, pamphlets or in the class room, directly or indirectly, the integrity of our institutions, while in a minority, are numerous. Of course the vast majority of the teaching force of our country is patriotic, self-sacrificing and wholly out of sympathy with them. This is likewise true of the editorial staffs of our publications; but largely because of their unusual and startling expressions this minority attracts attention particularly among certain portions of our citizenship, whose surroundings and lack of success in life render them especially susceptible to corrupting influences. What they say and what they do is passed on and has an effect far beyond what would be expected from so small a body. These people are reinforced by the wealthy parlor socialists so-called. This genus flourishes in our great cities. They are usually the children or grandchildren of honest people who have made money. They indulge in wise-sounding talk about a better and more equitable distribution of property, and some other form of government, not usually specified, under which everyone will be happy. I have not observed that any of these people have yet divided their goods among the poor, or denied themselves any comforts in the interest of those whom they call the proletariat, for whom they say their hearts are beating and almost breaking.

Allied with the two classes I have mentioned are organizations such as the I. W. W. and certain radical groups having their offices in New York City, with branches in other cities, which are devoted to producing what is called class consciousness. I doubt if the extent of the propaganda carried on by these and other similar organizations is at all appreciated by the public in general. They are heavily financed. Of that there can be no doubt. It would be impossible for them to carry on their activities without ample funds. They seized upon the great war and the disturbed conditions it created to become at first more openly hostile to our government, which led them into pro-German activities

and thus subject to the penalties prescribed by war legislation. Those who remained out of jail became, during the continuance of the struggle, more quiet, as they are not, as a rule, composed of the stuff of which martyrs are made, although they were secretly doing everything possible to impede the government.

It is becoming a mere bromide to say that the war has left the whole world in a state of unrest and ferment. Orators proclaim this in public speeches as though they had discovered something. Of course, the statement is true; mankind is neurotic as the result of the terrible experiences during the struggle, but this unrest is not the cause of the propaganda referred to. It merely furnishes a state of mind which makes the carrying on of the propaganda more dangerous to the public safety. This state of mind is now and will, for the next few months, no doubt be greatly aggravated by the unemployment that is existing. An agitator can get much further with a group of hungry men than with one who is employed and comfortable. We have legislation on the statute books which goes a certain way in suppressing this sort of literature, but under the construction of that legislation by the courts in the light of the constitutional provision for freedom of speech, something more than repressive legislation is necessary to meet the situation. Wise and systematic education is in the long run much to be preferred to punitive statutes.

That great patriot, Colonel Roosevelt, when President, wrote the Attorney General of the United States under date of March 20, 1908, in denunciation of anarchistic publications, declaring them the enemies of mankind, and asking for an amendment to the Revised Statutes excluding treasonable utterances from the mails. In his letter he used this language with reference to a certain paper:

> The immigration law now prohibits the entry into the United States of any person who entertains or advocates the views expressed in this newspaper. It is, of course, inexcusable to permit those already here to promulgate such views. . . . No law should require the Postmaster General to become an accessory to murder by circulating literature of this kind.

The statute was amended so as to prohibit the circulation in the mails of any writing containing matter advocating or urging treason, insurrection or forcible resistance to any law of the United States, and it was made a criminal offense to mail any such matter. But the courts, while declaring such laws constitutional, have indicated that pretty extreme language does not come within its specific words, although in time of war the statute was given an application to words which tended to impede the recruiting and maintenance of the army.

One of the leading radical publications which bears evidence of being edited by one of the so-called intellectuals, and which is found on sale at the news stands over the country, carried on the back page of a recent number an advertisement of its excellence and a request for subscribers. In this advertisement it printed a letter from a professor of history in an eastern college, wherein, among other things, he commends this journal in the following language:

> I wish that I possessed the means to place it in every home in the country. But it is not merely the stimulating quality of your thought that I find so enjoyable. It is your method of presentation. The irony, the humor, the literary allusiveness with which you fill your editorial columns week by week that are a constant source of delight.

Turning to the editorial page from this pleasant advertisement, we find an editorial based upon the addresses delivered by the Attorney General of the United States and Solicitor General James M. Beck at the recent meeting of the American Bar Association, which, after speaking of these really great addresses as oratorical antics, proceeds:

> People have contempt for the law because they feel it to be contemptible; and examination shows that their instinct is abundantly justified. The law is at present probably the most sordid, disreputable and depraving institution in the country; and the instinct which now feels it to be so, will in time—a short time, if it keeps on strengthening at its present rate—become transformed into the reason which knows it to be so.

I have quoted from this article because it is typical. It is interesting to observe that within a few days the editor of this paper and the editors of two other leading radical magazines which are on sale everywhere and are circulated by the thousands, were the speakers at a farewell dinner given in New York in honor of four Russians convicted of violating the Espionage Act in war time, and who by reason of such conviction have just been deported to Russia. Not long ago, an organization comprising hundreds of thousands of men announced by solemn resolution that the members would determine for themselves, rather than abide by the judgment of the courts, as to whether laws were constitutional, and whether or not they would obey the decrees of the courts. Another group advises, through its publications, that it has affiliations with great organizations in all parts of the country, specifically naming various ones in Chicago, Seattle and other places, and that its activities will be devoted to securing for this country the same beneficent soviet rule that is being tried out in Russia.

It may be urged that we should not be unduly alarmed in our free America by the mouthings of this sort of people. That is true, if the public intelligence and conscience are aroused; but it must be remembered that these people are organized; that they are particularly strong in the centers of population, and are faced and combatted only by the unorganized conscience of our people. It has been estimated by competent writers that less than two per cent of the people of France believed in the bloody methods of the French Revolution. The remaining ninety-eight per cent were inarticulate. An absurdly small minority now controls the great Russian Empire. Under the impetus of war the patriotic spirit of our country rose so high as to overwhelm these agitators, and as I have said before, those who were not in jail were dried up; but that spirit of exaltation, so abundant in those great days, has subsided. The natural reaction has come; the patriotic organizations which existed in every locality to hunt out and put down the enemies of our government have dissolved, and no longer function.

It seems to me that it is the peculiar privilege of the Bar of the United States to take up this burden and to conduct a propaganda of our own in support of American institutions. When we entered upon our practice, we took an oath of office in which we swore allegiance to the Constitution of our country. I take it we do not comply with that oath by obeying it only in the court room, but that it is our duty, as men who have, in the pursuit of our professions, necessarily studied the science of government and the history of the rights of men whose liberty and property are protected by the limitations of our Constitution, to take the lead in conducting such a counter-propaganda. While in a way the public knows of the disastrous results of class government or class tyranny in Russia, there has not been generally set before the people the

details of the so-called constitution under which this tyranny operates and the adoption of which in principle is advocated by so-called class agitators here. The citizen there has no protection. Revolutionary tribunals, estimated at over 500 in number, have been guilty of thousands of summary executions, and the constitution of the soviet republic, proclaimed on November 7, 1917, not only contains no provision such as ours, making it a government of all the people, but expressly excludes from any share in the government great classes of the best people, and creates such inequalities in the right to participation that the men who have what we call a stake in the country, such as a western farmer owning his own farm, would be in very many cases excluded. If such a farmer possessed more land than he could till without assistance, and employed a hired man, he would lose his vote. No person who has an income from rents or property is permitted to vote. No merchant or trader can vote; no clergyman can vote, and any soviet can deprive even the remainder of the community of the right to vote by the passage of a resolution that a person has been guilty of a selfish offense.

That is the sort of substitute seriously proposed by radical agitators in America for our present beneficent institutions, our Constitution framed and interpreted by great men, under which for over a century and a quarter America has prospered with greater individual freedom than any country in history. The result in Russia is the natural one. It is a government of power, and not of law. It has produced poverty, disease and misery unspeakable. Naturally neither you nor I fear the adoption of any such scheme in our country in its entirety, but the constant appeals to prejudice against those who are successful, with the suggestion that under our system of government no man can succeed by honorable methods, the claim that only the small group who take to themselves the exclusive use of the word "workers," coupled with the assertion that all who are not members of the group are leeches and a burden on society, do appeal to the ignorant, and in many cases to the unsuccessful, who are not at all ignorant. Already losses by sabotage alone, which is the direct result of the teachings of these revolutionary societies, are colossal. The public mind is being poisoned by this constant flood of writings that is offered for sale on every news stand. There is little organized effort to meet it. So I say that the first and peculiar duty of the members of our profession is to take every opportunity in public meetings and in private conference to instill into the public mind a reverence for law and for our institutions. No one can have any fear of the result if we awake to the peril. Revolutionary ideas in America cannot stand before public debate, but they may flourish as the result of wicked agitation and propaganda, if there is no debate. This assault on our free institutions has proceeded far beyond the point where it may be ignored. When men openly preach and write against a government of law, they are inviting us back to the days when there was no law and the most powerful man with his followers preyed upon the rest.

The charge constantly made by these people, that justice is not honestly administered, and that there is one law for the rich and another for the poor, is not true. We as lawyers know it is not true. It is because the law is uniformly administered in the case of the violent and vicious as well as the peaceful, that its administration is denounced by the class which I have been discussing. No one pretends that the dispensing of justice is perfect. If it were we would not be laboring to make it more perfect. Anything attempted by man is subject to human error. We recognize that by establishing Courts of Appeal to correct error. In spite of this we know that the great body of law founded upon the collective wisdom and experience of the ages has made men free, and under its beneficent sway in our land, peace, contentment and prosperity have come in greater measure than anywhere in the world. If we strike down the limitations in our Constitution and the system under which we have grown great, either by direct overthrow or by an unlimited expansion of the police power, we will have either the tyranny of individuals or the tyranny of the mob, and in the end will arrive at that state where, as the great dramatist says:

> Everything includes itself in power,
> Power into will, will into appetite;
> And appetite, an universal wolf,
> So doubly seconded with will and power,
> Must make perforce an universal prey,
> And last eat up himself.

The Kansas Industrial Court

"Kansas is once more offering herself as the testing ground of a great economic experiment, just as she did in the days when the extension of slavery was the burning question, and again in the early years of the liquor prohibition idea. Now she is pioneering in the field of labor's relationship to the law.

"Early in 1920, the Kansas legislature tried to put the lessons of the coal miners' strike of 1919 into effective use by creating an Industrial court and giving it jurisdiction over such capital and labor disputes as involve the manufacture or preparation of food, the manufacture of clothing, the production of fuel and the operation of public utilities. The act contained many clauses safeguarding the rights of labor. It was passed by a wide margin of votes in both houses. There has never been an indication that it does not represent the will of an overwhelming majority of the people of the state.

"The Kansas coal miners, whose strike gave rise to the popular demand for this law, have fought the Industrial court idea with bitterness. Lately the court has issued an order forbidding the mine union officers to call strikes; the labor leaders have met this with a refusal to recognize the authority of the court, and, despite orders from the international convention of their union to put their men to work, have persisted in their attitude of defying the world. So now two of them are in jail, thinking it over.

"It is hard to follow the mental process of these men. They are trying to put themselves, their trade, their power of harming their fellow citizens by depriving them of a necessity of life, above the law. No minority can be allowed to do that; and the people of America are becoming more and more aware of the fact.

"Labor is fighting, sometimes wisely, sometimes blindly, to improve the condition of the worker within the community. The Kansas Industrial court is a step in the same direction. The Kansas miners, on the other hand, are fighting against the community and against their own best interests."—*Chicago Evening Post.*

LEGAL ASPECTS OF FOREIGN TRADE

Activities of Division of Commercial Law Recently Organized at Washington to Aid American Business Men and Their Legal Advisers to Solve Important Problems

By A. J. WOLFE
Chief of Division

THE Division of Commercial Laws is in the fourth month of its existence as an organized unit in the Bureau of Foreign and Domestic Commerce. In it is centralized the work of gathering and disseminating information on foreign commercial laws and the legal aspects of foreign trade. The service from point of view of clientele is twofold: It supplies information to all American business houses on the general requirements of foreign countries with regard to opening branches, incorporating under foreign charters or domesticating American companies; on taxation; on general principles of law; on the best methods of dealing with such problems as overdue accounts abroad; on specialists in the laws of foreign countries either in the United States or abroad. To the member of the Bar it seeks to make accessible the texts of foreign codes in the original or in translation; to supply advices with regard to current changes in foreign commercial laws; to keep them in touch with competent colleagues in foreign lands. Care is taken to avoid on the one hand the furnishing gratis of legal opinions which should be secured from legal advisers, and on the other the giving of merely perfunctory service.

Every bona fide inquiry is handled with the aim of rendering practical help and of doing so ethically. The Division of Commercial Laws has received many encouraging letters both from business houses of high standing and from members of the Bar showing that it is supplying something very much needed in American foreign trade. In its work the Division of Commercial Laws has the assistance of cooperating committees of credit men (appointed by the Foreign Credit Executive Committee of the National Association of Credit Men) and of prominent international lawyers in the United States. These committees are to guide and to aid the Division in the important research work which it has undertaken into the operations of commercial laws abroad, which will eventually lead to the preparation of comprehensive digests of foreign laws.

In the meanwhile, in addition to a correspondence growing daily in volume, the Division of Commercial Laws has two media open for the publication of articles and bulletins: *Commerce Reports*, the official organ of the Department of Comerce, now a weekly economic journal of great scope and interest, has a section devoted to Commercial Law, which is contributed by the Division of Commercial Laws. *Commerce Reports* is an official government publication, and in accordance with congressional regulations, the free list is restricted to certain schools, libraries and government institutions. It can be obtained by subscription or the purchase of individual copies at a nominal price.

But the Division of Commercial Laws publishes currently mimeographed bulletins of foreign laws and any reputable attorney with interest in international law may be placed on the mailing list. Among articles of importance published so far by the Division of Commercial Laws may be noted "Prewar Contracts with Enemy Firms," in 2 parts, and "Exterritorial Jurisdiction," a series of 3 articles now running.

The following list of articles which have appeared in the October and the November issues of *Commerce Reports* is taken from the monthly index numbers:

Commercial laws, American bills of lading, British decision concerning,
cargo losses, international agreement concerning liability,
commercial arbitration abroad,
commercial arbitration courts to be created, Czechoslovakia,
commercial code of Argentina, proposed changes,
draft extension, Latin-American procedure,
foreign companies operating in Netherlands East Indies, legal requirements,
legal adviser's place in foreign trade,
power of attorney, Argentina,
Brazil and Chile,
Cuba,
quoting in foreign currency at fixed rate of exchange,
refused shipments, Argentine law concerning,
sales agency method of doing business with Spain,
service offered by new Commercial Laws Division,
standardizing laws affecting foreign trade,
steamship companies, foreign, Spanish decree affecting,
arbitration of commercial disputes in Mexico,
collecting delinquent accounts in Latin-America,
contract with enemy firms, status of pre-war obligations,
delivery of merchandise, Mexican laws,
incorporating in China, data available,
international legal and economic institute established at The Hague,
law bulletins for distribution,
legal aid in foreign lands.

Miscellaneous Law Bulletins (free to all who write for them while the supply lasts) have been published so far as follows:

CL-1. Draft Extension Troubles in Latin-America.
CL-2. Taxation of American corporations in Germany.
CL-3. British Court Decision on American Bills of Lading.
CL-4. Hague Rules of 1921 (Liability of cargo carriers).
CL-5. Miscellaneous Latin-American Laws.
CL-6. Miscellaneous European Law Bulletin.
CL-7. Miscellaneous Australian Law Bulletin.
CL-8. Incorporating in China.
CL-9. Miscellaneous Far East Law Bulletin.

Others are in preparation. CL is a symbol for Commercial Laws, and distinguishes these bulletins from others published by the Bureau.

The Division of Commercial Laws is prepared to furnish data with regard to the drawing up of powers of attorney for various countries; it is now receiving lists of lawyers abroad with data regarding the type of practice and the standing of each foreign practitioner.

It invites correspondence from members of the American Bar Association and will gladly avail itself of the benefit of their suggestions and guidance in order to make its service more practical, accurate and generally helpful.

CONFERENCE ON LEGAL EDUCATION

Special Mid-Winter Session of Conference of Bar Association Delegates to Be Held in Washington, D. C., February 23 and 24, 1922—Statement by Committee in Charge

"If the bar of America is to continue to perform its function, there must be something besides an aggregation of case lawyers depending on some judge's decision. The members of the bar must go farther than it was necessary to go a half century since. They must seek for and find and make their own the guiding lines of the principles of the common law which underlie all this multitude of decisions which are slowly modified by the multitude of statutes.

"Today there must be systematic education. To perform that duty of the bar to the public there must be labor, there must be effort. It can no longer be a matter of first impression and superficial quickness of wit. The finding of the guiding lines of principle that are to steer the lawyer through this wilderness requires a knowledge of the history and the background of the law.

"The background of the law, it should be understood, consists not merely of the adjudicated cases, not merely in finding out how this judge decided on this state of affairs, and another judge decided on another similar state of affairs, or the same state of affairs. The competent lawyer, competent to exercise his authority and to vindicate his right to his privilege, must steep his mind in the background of the law and the background of the literature which explains its growth, the true character and scope of its principles, the true method and spirit of its application, which is to be found in the history of America and of England. . . .

"The background of the law is found in Chitty and Coke and Blackstone, and Marshall and Kent and Story; it is Milton and Shakespeare and Chaucer, and Spenser and Hawthorne and Emerson and Bancroft and Parkman, and all the great array of Americans who made their country's literature and who have been for the last century gradually building up the noble structure of recorded American history. That is an essential to the performance of our duty, and no man should be entitled to the privilege who is not able to render the service of hard and devoted labor to fit himself for the exercise of the authority."

From Chairman Elihu Root's address before the Section of Legal Education at Cincinnati, Aug. 30, 1921.

THE American Bar Association has entered upon a campaign to raise the standard of legal education throughout the United States.

At its annual meeting last August, the Association adopted a resolution calling a conference on legal education to which all state and local bar associations should be invited to send delegates. A formal invitation to this conference has been sent out by the Conference of Bar Association Delegates, a section of the American Bar Association. We have nearly completed the detailed program and are already in a position to announce that Chief Justice Taft and Secretary Hughes will each preside at one of the sessions of the conference. From letters already received there would appear to be a general recognition of the importance of the occasion and an intention on the part of state and local associations to send as their representatives leading members of the Bench and Bar. The character of the program, and the number and character of the delegates will, we believe, make the meetings of the conference occasions of great interest, and lend weight to any action taken.

In bringing about this meeting the American Bar Association recognizes that an important public duty resting on the profession is its obligation to do all it can toward making the lawyers of the future morally and intellectually fit to perform efficiently the services which the community has a right to expect them to perform. The call for the conference also marks the termination of the work incident to the formulation by the Association of standards of legal education, as we hope the conference itself will mark the beginning of an active effort in each state to create conditions favorable to the adoption of these standards.

In the summer of 1920, the Section of Legal Education and Admissions to the Bar of the American Bar Association provided for the appointment of a special committee to report to the next annual meeting "their recommendations in respect to what, if any, action can be taken by this section or by the Association to create conditions which will tend to strengthen the character and improve the efficiency of those admitted to the practice of law." The committee consisted of Hugh H. Brown, of Tonopah, Nevada; James Byrne, of New York City; William Draper Lewis and George Wharton Pepper, both of Philadelphia; George E. Price, of Charleston, W. Va.; Frank H. Scott, of Chicago, and Elihu Root, Chairman. The committee studied the report of the Carnegie Foundation, entitled "Training for the Public Profession of the Law," which had not yet appeared publicly, procured the counsel of law school men and of practicing lawyers from all parts of the country by means of a questionnaire, and invited a number of men of different opinions to attend an informal meeting for discussion. The Committee's report was submitted to the Section of Legal Education on August 31st last, and was approved by a vote of a large majority of those present after full discussion. On the next day resolutions containing the gist of the report were adopted by the

Association, again after full debate, and by a very large majority.

The first resolution sets forth the standards of legal education, and is as follows:

> The American Bar Association is of the opinion that every candidate for admission to the bar should give evidence of graduation from a law school complying with the following standards:
> (a) It shall require as a condition of admission at least two years of study in a college.
> (b) It shall require its students to pursue a course of three years' duration if they devote substantially all their working time to their studies, and a longer course, equivalent in the number of working hours, if they devote only part of their working time to their studies.
> (c) It shall provide an adequate library available for the use of the students.
> (d) It shall have among its teachers a sufficient number giving thir entire time to the school to insure actual personal acquaintance and influence with the whole student body.

The second resolution relates to the necessity for the examination by public authority of candidates for admission to the bar, and is a reaffirmation of prior action taken by the Association:

> The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness.

The third resolution is an important direction to the Council on Legal Education:

> The Council on Legal Education and Admissions to the Bar is directed to publish from time to time the names of those law schools which comply with the above standards and of those which do not and to make such publications available so far as possible to intending law students.

The fourth and fifth resolutions direct the issuance of a call for a conference on legal education, besides dealing generally with the cooperation of bar associations in an effort to create conditions favorable to the adoption of the standards of legal education set forth in the first resolution.

It is in carrying out these resolutions that the National Conference of Bar Association Delegates is calling a Special Mid-winter Meeting in Washington for the special purpose of bringing this matter to the attention of all the bar associations of the country.

The Fundamental Thought Behind the Conference

The controlling distinction between a business and a profession is in the motive force behind the individual in his vocational activity. In business he is moved by the desire for profit; in a profession he is moved by the duty to serve. Everyone expects the doctor to serve, not because of the fee, but just because he is a doctor; so, too, the lawyer, an officer of the court, who holding his office may lose it for misconduct measured by standards of fiduciary honor, than which there are none higher. True, it is that many business men are guiding their lives by the professional motive. True, also, it is that in law, as in medicine, many are commercializing their profession. But the aim of the body of doctors and of the body of lawyers, is to maintain the professional ideal, to stimulate and energize the professional motive. And the public, the people, the patients or the clients, are vitally concerned in the upholding of this ideal. For how can the community be properly served save by men of high honor and trained ability? Today as never before, high ideals, combined with native skill, will alone make neither a doctor nor a lawyer. Education, training, knowledge of the lessons of the past, knowledge of the law itself, as well as practical skill in the application of the principles of the law to the new and complex problems of life, these are the stuff which, combined with character, makes lawyers worthy of membership in the profession. The public is entitled to nothing less, should insist upon having this much, not alone because the lawyer helps to mould the law by which we all are governed, nor yet because he becomes the judge who will apply it, but also because, in the daily advice to the client, if he be not adequately equipped to serve, the person injured is his client. A few well-trained men may serve the few, but the many should have good service too. Shall there be only poor service for the poor?

In this spirit, and with this aim, the American Bar Association has initiated the calling of the Washington mid-winter meeting of the National Conference of Bar Association Delegates. This is the Association's message to the organized bar of the country: Prepare the men who will follow you for the tasks of service they may perform. Give to the men who are coming after you the moral character and training they require for their task. If you who understand the needs of the service do not meet them you will be unfaithful to your calling.

The success of the conference depends on the character and professional standing of the delegates. We are asking the officials of the state and local bar associations of the country to appoint as delegates men who have distinguished places in our profession and who are willing to give time to help the bar establish proper legal educational standards.

ELIHU ROOT, New York, Chairman.
JULIUS HENRY COHEN, New York.
JOHN W. DAVIS, West Virginia.
CLARENCE N. GOODWIN, Illinois.
CHARLES M. HEPBURN, Indiana.
WILLIAM DRAPER LEWIS, Pennsylvania.
WILLIAM H. H. PIATT, Missouri.
JOHN B. SANBORN, Wisconsin.
THOMAS W. SHELTON, Virginia.

Joint Committee, Section of Legal Education and Conference of Bar Association Delegates.

We are further advised by Judge Clarence N. Goodwin, chairman of the Conference of Bar Association Delegates, that Hon. Elihu Root will speak at the opening of the conference and that, in addition to Chief Justice Taft and Secretary of State Hughes, Hon. John W. Davis has consented to preside at one of the sessions. President Angell of Yale University will speak on "Education." At the evening session on February 23 Dr. William H. Welch of Johns Hopkins University will deliver an address on "Factors Concerned in the Improvement of Medical Education in the United States." Many prominent judges and lawyers have already been appointed delegates. The Chief Justice of Pennsylvania will head the delegation from that State.

The Conference will be held in Colonial Hall where the Arms Conference is now meeting.

LEGAL EDUCATION AND DEMOCRATIC PRINCIPLE

Critical Examination of the Conclusions of the Recently Published Carnegie Foundation Report on Training for the Public Profession of the Law

By Harlan F. Stone
Dean of Law School, Columbia University, New York

IN January, 1913, the Committee on Legal Education of the American Bar Association addressed to the President of the Carnegie Foundation a request that the Foundation undertake an investigation of the "conditions under which the work of legal education is carried on in this country" and of "the matter of admission to the bar in the various states of the United States."

In response to this request the Carnegie Foundation undertook the difficult task of making a thoroughgoing study of the problems of legal education in the United States. In 1914 the Foundation, as a result of this study, published a preliminary volume dealing with the Case Method in American Law Schools, prepared by Joseph Redlich, the eminent publicist and professor of law of the University of Vienna. This publication attracted wide attention and almost universal commendation, not only because of its accurate observation and lucid exposition of the subject but because of the very unusual grasp displayed by its author, a foreigner, of the essential problems of legal education in America.

Now after a period of eight years, which has proved none too long for so arduous an undertaking, the first fruits of the study of the other and more difficult problems of legal education are presented to us in a volume of 467 pages entitled "Training for the Public Profession of the Law" and dealing with the historical development and principal contemporary problems of legal education in the United States with some account of conditions in England and Canada.

A summary of the report prepared by Mr. John B. Sanborn of the Wisconsin bar was published in the November number of the American Bar Association Journal, as was also a supplemental statement by the author of the report, Mr. A. Z. Reed, entitled "Raising Standards of Legal Education." This statement is an excerpt from a forthcoming Bulletin of the Carnegie Foundation.

The credit for the production of the present volume is due entirely to the industry and devotion of Mr. Reed to whom the work of the investigation has been committed by the Carnegie Foundation from the beginning. Mr. Reed is not a lawyer nor did he, on undertaking this work eight years ago, possess any special acquaintance with the problems of legal education, a fact which has undoubtedly added to the difficulties of the undertaking, although it has enabled him to bring to it a mind unembarrassed with prejudices or with preconceived notions of what is educationally desirable. His task has necessarily involved the process of self-education in the perplexing problems of legal education, and the result is a volume rich in information which has been gathered with exceptional industry and meticulous care. One will find here data on the development of legal education in the United States, on the history and organization of bar associations and bar admission requirements which could have been assembled only after painstaking and diligent search of records and original sources not easily accessible. In the language of President Pritchett of the Foundation, who writes the preface, the volume is presented "as a patient, scholarly, and serious effort to trace the development of American legal education and the relation of the law school to the practice of law and to point out certain broad lines along which legal education and admission to the bar must develop if the profession of the law is to fulfill its true function."

We are promised still a third bulletin which is to discuss the period from 1890 to 1914 in connection with a more intensive survey of the contemporary situation.

The strong points and the weaknesses of the report are those which might be predicted from the author's own peculiar experience. It is disinterested and written in a spirit of fairness of one who obviously has "no axes to grind." Its approach to the subject is that of the liberally educated man who seeks to gain some intimate knowledge of our legal system and of the problems of training for its practice which are something of a popular mystery and not entirely an open book to the men of experience in education but its pages also disclose the disadvantage under which one labors who attempts a critical examination of legal education in America and its relation to the bar and the practice of the profession, who has never had the experience of a law student or a law teacher, who has never practiced law or had any first-hand acquaintance with what goes on in the daily work of the modern law office.

There has grown up about the reports of the great educational foundations a tradition of infallibility in matters educational, against which the public should be on its guard. As a people we are rather too inclined to accept as final, divers pronouncements on matters of public interest merely because they are spoken in the words of authority and with an air of finality. The fact is that while some of these reports have proven to be extremely valuable, others when subjected to critical examination are found not to be of a character to carry conviction to readers familiar with the facts or to influence the trend of educational events. In examining this as well as the other documents which from time to time emanate from these bodies and in endeavoring to assign to them their proper value, we will do well to remember that the opinions which they express on technical and specialized subjects are of weight only so far as they are based on accurate data comprehensively gathered which have been subjected to expert scrutiny and tested in the light of actual experience.

One of the merits of the case system of legal instruction which has been so widely adopted in American law schools is that it takes little for granted. It looks askance at authority which does not have

the support of reason and experience. It insists on knowing the precise facts on which conclusions are based and in scrutinizing the processes by which those conclusions are reached. And we may not unnaturally expect that this report, as it is read by the large number of persons in the United States who are interested in legal education, will be subjected to a similar analysis and scrutiny. But whether we agree or disagree with its conclusions, all will agree that a serious effort to study this problem is worthy of commendation and all will recognize in the present volume a valuable instrumentality for provoking discussion, stimulating thought and crystallizing opinion on this important subject.

The conclusions announced by the report are in many respects novel, differing widely, upon fundamental matters, from the opinion held by any of the several divergent schools of thought, which embrace most of those individuals who by special study or experience might be deemed to speak with some authority on the problems of legal education.

Before stating these conclusions it is important to digress briefly but sufficiently to point out the state of opinion on the subject as it was when the Carnegie Foundation was invited to make this study of legal education and as it has continued to be down to the publication of the present report. For something more than twenty years those familiar with the subject have noted a rapid increase in the number of those entering the legal profession, and the steadily increasing percentage of those coming to the bar in this country, who have entered it with low educational qualifications. They have noted too the correspondingly rapid increase in the number of law schools which for want of a better term may be described with substantial accuracy as "low grade" schools; low grade because their entrance requirements are not more than a high school training,—sometimes not that,—and their educational program is so organized as not only to permit but to encourage their students to use their time during the business hours of the day in other pursuits. They have observed, too, with dismay the growth in many states of a system of bar examinations which encourages cramming or the memorizing of rules, legal maxims and the minutiae of statutes, rather than the acquisition of systematic knowledge of legal principles and the developed capacity for applying legal reasoning to legal problems, as the swift and certain way to admission to the bar.

Those who have been engaged in the work of the great university law schools, which we may term high grade schools since they require two or more years of college training for entrance and have so organized their work as to preclude their students from engaging in other pursuits, as well as those members of the profession who have taken high ground with respect to the duties and obligations of the lawyer, have not hesitated to say that this combination of low grade law schools and low grade bar examinations is a pernicious one. They have insisted that the low grade schools have commercialized legal education by thus making it easy for the man of defective education and low order of intelligence to enter the bar without adequately preparing himself to assume its duties and responsibilities. We have, they insist, by this procedure, actually been attracting to the bar large numbers of men who are unfitted to become lawyers, who a generation ago would have been dismayed by the greater difficulties of the office apprenticeship and who would have remained artisans, tradesmen, or small business men. The critics of our present system regard this influx to the bar of the obviously unfit as a menace to the administration of justice and as progressively debauching the bar to an extent calling for radical reform.

Those interested in the low grade school, on the other hand, have not been outspoken defenders of it. So long as they have been able to attract students and have not been interfered with by more exacting standards of bar admission requirements, those schools have not sought to justify their existence by an appeal to any profound political or social philosophy and have been content to advocate the superiority of their type of school by claiming for it the merit of some peculiar method of instruction or the special earnestness of its students or by arguing the needlessness of attending a full time school (which is likely to become "too theoretical") when one can be admitted to the bar by devoting only a portion of his time to law study in a part time school.

In discussing this matter both sides to the controversy have recognized as not open to question the fact that in setting up standards of admission to the bar we are obliged to set a single standard for the graduates of all types of school since neither by legal requirement nor in actual practice is there a separation of the bar into classes nor is there any discernible prospect that there ever will be such a classification. Once the prospective lawyer has completed the required period of study and passed the required bar examination, he is, in practically every state, authorized to take any kind of a case, to perform any and all functions of the lawyer with respect to it and to appear in any court to present it. He may aspire to any position at the bar provided only clients may be found who will entrust him with cases on which he may practice.

This being the actual situation, whether any reform is desirable and if so, whether there is any practicable method of accomplishing it are among the more important of the many questions which the Carnegie Foundation was called on to answer when it undertook its study of legal education. To these questions, however, the present volume gives no very direct or explicit answer. It may be said, however, to answer them by implication by the conclusions which it reaches and which will be found restated in summary form at pages 416 to 420 of the report. Upon examination it will be found that the conclusions there announced rest upon the broad assumption, which the author evidently regards as so self evident as to require no demonstration, that the democratic principle in the organization of our government requires that the creation and administration of law and hence admission to the bar "must be kept within the reach of the great bulk of the population." From this follows, apparently, the conclusion which may be regarded as the principal contribution of the report, that the low grade law school is justified and should be cherished and protected and consequently that the low grade bar examination is likewise justified and should be cherished and protected, since with prevailing standards of education and popular intelligence it is only by the preservation of these standards and methods that the way can be kept open for the great bulk of our population to enter the bar.

That the lawyer's function is in a certain sense political, we do not question. This is due not so much to the fact that legislators, administrative officers, and judges are drawn largely from the lawyer class, as to

the circumstance that the development of unwritten law is profoundly influenced by the researches and arguments of counsel and that private individuals cannot secure justice, which it is the function of government to give, without the aid of a special professional order to represent and advise them. But that a democracy should leave the performance of this function open to the great bulk of the people without a serious effort to limit the membership of the profession to those who are fitted for the performance of that function is a proposition to which assent will not so readily be given.

The reader, therefore, must needs pause here to ask two questions to which no explicit answer is given by the report. The first is whether by keeping admissions to the bar "within the reach of the great bulk of the population" the author really means that no limitation should be imposed on admission to the bar requiring a greater financial sacrifice or more self-denial than those who constitute the great bulk of the population feel able to make in order to better their economic and social position. If so, the author's main thesis is substantially that underlying the provision of the constitution of Indiana which secures to the citizens of that state the constitutional right to become members of the bar without any training and it is certainly one that cannot in this day and generation be accepted as a self evident truth or a truth which is very generally accepted as such, since the requirement for admission to the bar in the majority of states far exceeds the limitation here suggested. The great bulk of our population does not feel able to make either the financial sacrifice or the intellectual effort or both, necessary to secure the high school education and the technical training which our most progressive states now require for admission to the bar.

It is rather to be supposed that the author did not intend to suggest that some sacrifice even in a democracy like ours, might not be required of candidates for admission to the bar beyond that which the great bulk of our population feels able to make, the more so since he nowhere suggests that our bar requirements are too high or that they ought to be lessened in order to maintain the democratic principle, or that they violate the democratic principle by placing some restriction on admission to the bar which would undoubtedly be found sufficiently irksome to the great bulk of the population to preclude in practice its membership from ever aspiring to be lawyers, such as the requirement of a clerkship, often poorly paid or not compensated at all, or the requirement of three years spent in law study, or that candidates for admission must pass a preliminary examination in Latin, or complete a full high school course and the like.

Indeed in discussing the matter of pre-legal liberal education to be required of the prospective lawyer, the report says:

> There is no way of determining the precise moment when a state may properly require its lawyers to possess any given amount of general education. The demands of immediate efficiency and of forward-looking democracy cannot be entirely reconciled. Each must yield something to the other, in order that our institutions may be properly run today, and yet rest on the enduring popular basis. The resulting system is not a logical deduction from *a priori* principles. It is a practical compromise forced upon us by the imperfections of the world we live in.

We may therefore take the report in its entirety as conceding that the democratic principle as the controlling influence in determining what limitation should be placed on admission to the bar in matters of technical training as well as of liberal education does not preclude definite and, to some extent, burdensome restrictions to the end that extreme democracy in law administration may be tempered with efficiency and skill of those who participate in it.

Once this concession is made it becomes necessary to pass to the second inquiry and that is how far we are justified in placing restrictions upon admission to the bar based on training and intellectual attainment and whether we have now reached the limit of progress in that direction. These are the questions which members of the bar, law teachers, and committees on legal education have been insistently asking and which in fact directly led to the request of a committee of the American Bar Association that the Carnegie Foundation make this study of legal education. The prolonged discussion of these questions had inspired the hope that some adequate attempt would be made to answer them in this report.

For the present at least that hope is doomed to disappointment for the report does not give us any answer to these questions nor does it enter into any discussion of them which will aid in determining whether we have reached that point of practical compromise where our efforts to improve conditions must cease. Impliedly but not explicitly the assumption is made that we have already reached the point beyond which it is not safe to go in raising standards. But this is purely an assumption. That it is not a self evident truth, nor one likely to be accepted as such is apparent from the recent action of the New York City Bar Association, the New York State Bar Association, and the American Bar Association in recommending the adoption of substantially higher standards for admission to the bar than any now obtaining in any state. The action of the American Bar Associaion was taken on the recommendation of a committee headed by Elihu Root and composed of a membership whose opinions are of weight with the profession throughout the country and it is interesting to note that the recommendations of the committee were made not only after a study of the present report but after it had had the benefit of the views of the author of the report presented in person at a hearing of the committee in New York City.

In view of the opposite conclusions reached in this report from those reached by the Committee of the American Bar Association, it is somewhat surprising, although none the less gratifying, to find Mr. Reed in his recent article in the AMERICAN BAR ASSOCIATION JOURNAL saying, "The present opportunity seems a suitable one for declaring that the action just taken by the American Bar Association is one of the most encouraging developments in the field of legal education that has recently occurred and constitutes a long step in advance."

One does not find in the original report any evidence that the author regards the efforts of those who for the past ten or fifteen years have striven to secure the adoption of standards of education both liberal and technical somewhat higher than those now in force as worthy of recognition and encouragement. On the contrary, there is a tendency throughout the report to discourage those efforts as undemocratic or made in the interests of some particular type of legal education. This attitude is perhaps due to a lack of appreciation of their real significance or to a failure to visualize the immense possibilities for public good involved in a genuine attempt on the part of the bar to raise the educational standards of admis-

sion to the bar. But whatever the explanation is, the fact that the author now regards the recommendations of the American Bar Association as most encouraging and as a step in advance, is worthy of emphasis in view of the interpretation which may be placed upon the original report by those whose interest it is to prevent any "step in advance."

After all, the preservation of the democratic principle in law making and in law administration does not require that it should be made easy for all members of the community to enter the legal profession. Since all men are not to be lawyers it is inevitable that there should be some process of selection and a process of selection which aims at insuring the fitness of those aspiring to perform a public function should not be rejected unless it will so operate as to preclude a fair representation of all classes of the community in their ranks. In view of the insistent demands on the part not only of those interested in legal education but of members of the bar, that we should adopt standards which will exclude from the bar as unfit, many men who are now admitted to it, it would seem that the first step in any adequate investigation of the subject would be to endeavor to ascertain in a practical way whether any standard which is proposed or likely to be accepted would in fact be destructive of the democratic principle.

Today popular education in the United States is carried on to an extent unknown at any previous period in the world's history. Not only are there great free institutions of learning of college grade maintained by the state to be found in every section of the country, but the privately endowed institutions of learning have large numbers of free scholarships and all afford to their students abundant means for self help. It has become almost a truism to those interested in liberal education that the man of good health, who is worth educating, can today give himself a college and professional education.

It would be an interesting study—and it is in fact a necessary study if we make the broad assumptions made by this report—to investigate the origin and social status of the students in any of the well known full time law schools of the country, requiring three years of college preparation for entrance. The bar in America even when standards of admission were higher than they are today was recruited very largely from the young men of slender financial resources, and the observation of the writer is that all classes of society would be well represented at the bar today and the democratic principle would be adequately preserved if the membership of the bar were drawn exclusively from the full time schools requiring three years of college training for entrance.

On the other hand an adequate study of this phase of the matter might reveal that the solution of the problem is to be found in an enlargement of our facilities for liberal education by making it more accessible to the more capable members of all classes of society rather than by the encouragement of professional training which is admittedly superficial and inadequate. The matter is of deeper significance than any mere educational problem. Fundamentally the question is whether democracy can survive and perpetuate itself, for it surely cannot survive if it cannot find a way to make its administration of justice competent. For us weakly to surrender to a policy of perpetuating an admittedly superficial system of training for the bar and admittedly superficial bar examinations is to give up the fight for democracy itself. Certainly before the American bar can be persuaded to commit itself to such a hopeless policy we believe that it will have to be convinced that there is no avenue of escape from so dismal a prospect and that with the rapidly increasing facilities for popular education we may not look forward to a bar which shall be to a reasonable degree both democratic and educated.

Although the report does not disclose how poorly the work of legal education is done in the professional law schools of the country it leaves no doubt in the mind of the reader that, in the opinion of the author, much of it is badly done and that it ought to be improved. In speaking of the part time schools he says frankly, "On the contrary it is not too much to say that they have done more harm than good to legal education." The report spares us any unpleasant details and thus misses the opportunity of giving to the public much information which it ought to have. Those who are interested in, and not already familiar with, this phase of the subject will find in a survey of Criminal Justice and Legal Education in Cleveland, recently published by the Cleveland Foundation, a detailed exposition in a typical case of the process by which education for the bar is being degraded in this country and he will gain from it some understanding of the evil consequences which flow from such degradation.[1]

How improvement is to be brought about is the question which more than any other will interest those who will turn to the report under review for counsel and guidance. During the past ten years a great deal of time and energy and some thought have been devoted to the effort to give some satisfactory answer to this question. The suggestions which have heretofore been most favorably received have been, first, the raising of standards for admission to the bar and second, the study and classification of law schools in some public manner by the bar itself acting through a committee or committees of a bar organization or organizations. Those who have urged classification of the law schools have had in mind the similar undertaking by the American Medical Association which has resulted between 1904 and 1915 in a reduction in the number of low grade medical schools and a consequent increase in the percentage of those attending high grade medical schools from 6.3% to 80%. And it is to be noted that the report of the Committee on Legal Education headed by Mr. Root (to which reference has already been made) which was adopted by the Association at its meeting last August, recommended the application of both devices as the first steps in the direction of improvement.

But the present report rejects the first suggestion and discusses the second only incidentally. It makes the sweeping assertion that all the efforts to improve the bar by raising standards and improving legal education have been based upon a fundamental misconception, viz., that "all lawyers do and ought to constitute a single homogeneous body—in common parlance a bar"; that there are broadly two types of legal education in America; one represented by the full time, high admission requirement schools organized in the universities, the other by the part time low admission requirement schools organized outside of the universities. These two types of school have bred different types of lawyers, hence the argument runs, since the "unitary" bar not only does not exist but is

1. The portion of the Cleveland Survey relating to legal education was prepared by Mr. Albert M. Kales of the Chicago bar, whose special fitness for the work will be recognized by members of the American Bar Association.

not even a possibility, it has become both necessary and desirable that both types of education should be perpetuated and encouraged and that bar examinations should be "adjusted" to both types of training. We are left wholly in the dark as to the method of effecting this adjustment but presumably it must be by giving a superficial examination to the superficially trained candidate and a more exacting and scholarly examination to the better and more thoroughly trained candidate. This device reminds one of the New England philosopher who cut two holes through his barn door, the one, a large one as a means of ingress and egress for the cat and the other a small one for her kittens. As a method of affording a means of access without inconvenient embarrassments to the candidates for admission and without imposing any change on the institution to which they are to be admitted, the adjusted bar examination would seem to be about as ingenious and as useful as the application of the double-entry system to the philosopher's barn door.

Although the bar is not entirely a homogeneous body and largely so because for more than a generation we have neglected the simplest precautions to make it such, nevertheless so long as we have an unclassified bar to what end are we to train and to continue to train two types of lawyers admitted to the bar by two types of examinations? And what hope is there, in such a program, for either a better bar or for improving our system of legal education?

The future of our system of administering justice is indeed a dismal one if the thousands of young men in this country, who are seeking to escape the burdens of manual labor by some easy road to a genteel trade, are to be permitted and encouraged to pursue a superficial training such for example as we find described in the Survey of the Cleveland Foundation, in order to pass a superficial examination which will legally entitle them to do everything that the thoroughly trained and rigidly examined member of the bar may do.

If it were possible to confine the activities of the product of the superficial school to the justice of the peace courts or courts of corresponding grade much might be said for such a scheme as is now proposed. At points in the report the author seems to hold out the hope of a classified bar or a functionally divided bar as something that eventually may be introduced. But we are left to surmise how this suggestion is to be squared with the doctrine that the fundamental principle that the bar is to be kept accessible to the great bulk of our people precludes our raising standards and how democracy in creating and administering law is to be maintained if the product of the superficial schools (which will always be in the majority, the author tells us) are to be excluded from the more important courts or the more important business or both by any method of classifying the bar whether formal or informal. Further one need hardly take the time to point out to a body of lawyers, at least, that every state but one has long since abandoned the classified bar and that its re-establishment in this country is as a practical matter a much more remote possibility than the ultimate creation of a substantially homogeneous bar through the processes of adequate bar examinations and a sound legal education.

The Carnegie report also seems to propose that the fledgling lawyer may very properly be trained superficially as a preliminary for carrying on the superficial type of professional business, and the suggestion is gravely made that "conveyancing, probate practice, criminal law and trial work are examples of topics that seem particularly appropriate for the relatively superficial schools."

It is only fair to say that the author adds the obviously truthful statement that "all this is guesswork, however." For every one who has had any extensive experience in practice is well aware that there is no functional-cleavage of the bar between the superficially trained and those who are thoroughly trained. It is well that it is so, for it is impossible to segregate into any one class the professional business which does not on occasion require all of the skill of the well trained lawyer and with respect to which the consequences of superficial training may be fatal alike to the interests of the client and to the proper development of the law.

But if standards of admission to the bar are not to be raised the question which most naturally occurs to the reader is just how is the admittedly poor work done by the weaker schools to be improved. The proposal for the classification of law schools as a means of improvement the author disposes of in a single sentence. He says (p. 219):

> Now, there can be little question but that the recent rank growth of law schools needs to be weeded out by the profession, through action similar in some ways to that which has already been taken in the medical field. But practitioners, themselves the product of every variety of institutional training, or of none, cannot easily agree which are the schools that produce valuable crops and which are the tares.

No basis of classification which might aid in bringing about an agreement, or assist in formulating a plan for the necessary weeding out is suggested.

Experience has demonstrated that the low grade school feels no very powerful incentive to raise its own educational standards so long as it can secure students, and that students will not be wanting so long as there are low standards and superficial examinations for admission to the bar. On this point the Cleveland Survey says (pp. 19-20):

> Nor is it practicable to call upon the night law schools run for profit to adopt a higher standard. It is an economic fact that so long as law schools run for private profit may freely enter the field of legal education, no such school can raise its standard above the minimum which will enable applicants for admission to the bar to pass the bar examinations. If one attempts to do so by requiring a longer period of study or more hours of study a week, it will at once lose patronage to a school which keeps to the minimum standard, or it will call into existence a school which will secure students on the basis of the minimum standard.

Now that these schools have formulated, ready to their hand, a new philosophy justifying and in fact commending their existence, is it to be supposed that they will be induced to remove their own deficiencies by the mere force of moral suasion? The author evidently believes that they may and that it will be entirely feasible to induce them to begin their own reformation by prolonging their period of law study for part time students beyond the standard period of three years, to something more than four years so that the duration of the period of law study may compensate for the time devoted to other pursuits during that period. This shows a commendable faith in human nature and such a consummation is devoutly to be hoped for but we venture to suggest that a much more efficacious and expeditious method of accomplishing the same result, and one more likely to bring success, would be the adoption as a bar requirement of the recommendation of the American Bar Association that all candidates for admission to the bar should be required to graduate from a law school requiring "its

students to pursue a course of three years duration if they devote substantially all their working time to their studies and a longer course equivalent in number of working hours if they devote only part of their working time to their studies." The Cleveland Survey makes it plain that the raising of bar requirements is the only practical solution of this problem. It says:

> The practical course to pursue in raising the standard of legal education in night law schools, run for profit, is to raise the standards for admission to the bar. By this means the increased standard must be met by all alike, and one school cannot cut in on another with a lower standard. Such a move would receive the support of proprietors of the present night law schools in Cleveland.

In this connection some comment should be made on the construction placed by the author on the attitude of those, especially interested in the problems of legal education, who have urged the adoption of higher standards of bar admission and legal education. Throughout the report the author discusses their relation to the problems of legal education as though they were hostile to all part time education and that their persistent hostility to it had in some way prevented the proper and natural development of this type of education. In this he sees only a "wrangling [by the schools] for the possession of a field too large for any of them to cover in its entirety"—to be condemned in unsparing terms, and he says (p. 417):

> If one-tenth of the thought that has been given to this vain effort had been expended upon the problem of dividing the bar along lines that can be justified on both political and educational grounds, by this time we might or might not have attained a solution entirely satisfactory from both points of view. These types might or might not have succeeded in apportioning among themselves all the manifold activities that are embraced in the expression "government and law." But we should hardly have been in so bad a situation as we are now . . .

This we believe is an entirely mistaken interpretation of efforts which have been made to point out the weaknesses of the part time schools. Their critics have been hostile to the part time schools not because they were hostile to part time law training as such or believed that all legal education must be cast in one mould, but because the part time schools have insisted upon attempting to do by part time work, but by the same methods and in the same period of time, the work of the full time school. As a class, they have stimulated and encouraged the superficial in legal education at the expense of the bar and of sound educational policy. Thousands of young men have been attracted to these schools not so much because of their own slender financial resources but because they have been encouraged to believe that there is no need to do with thoroughness what is permitted to be done superficially. To condemn the supporters of the high grade schools because they have insisted on pointing out these defects and that these schools have, as the author himself states "probably done more harm than good" is, to say the least, regrettable. It is the more so when the only specific remedy suggested is their encouragement and perpetuation by means of bar examinations adjusted to the superficial training which they provide.

The critics of the part time school have never taken the position that there was anything inherent in the part time plan of education which required it to be superficial or at least as superficial as it now is, provided it was continued for a period of sufficient duration to compensate in some substantial way for the loss of time given to other occupations and it has long been the opinion of the writer that part time schools by prolonging their period of law study could be organized on lines which would make them far more efficient, thorough and scholarly than they now are, that it is entirely practicable to bring about this needed reform by the methods now proposed by the American Bar Association and that such a reform is more in the public interest than is the perpetuation of a superficial type of education side by side with the thorough and scholarly type through the medium of an "adjusted" bar examination leading to admission to an unclassified bar.

Mr. Reed in his article in the last issue of the AMERICAN BAR ASSOCIATION JOURNAL is somewhat critical of the proposal of the American Bar Association that the loss resulting from attendance on part time law schools be compensated for by prolonging the period of study in such schools. The criticism is directed toward the practical difficulty of formulating a precise measure of equivalence, and the assertion is made that part time instruction and full time instruction are not even potentially equivalent and that consequently in fact one cannot be made the equivalent of the other. These are admittedly minor criticisms but it may be suggested that they are not even criticisms at all if one bears in mind the purpose of the American Bar Association's recommendation. The members of the committee who formulated the recommendations are not doctrinaires. They were not seeking with one fell stroke to place all law schools on a dead level of excellence in which the proficiency of all should be exactly equivalent to that of each. They are practical men and the aim embodied in their recommendation was to go a reasonable distance in a practical way toward eliminating educational methods which have made it possible for many schools to do "more harm than good to legal education" and to limit in some practical way the great numbers of unfit men who are now being admitted to the bar. One of the devices which they adopted for this purpose was the very practical and entirely feasible one suggested by Mr. Reed in his report, that the period of study in the part time schools be prolonged beyond that in the full time schools. In order, however, that this suggestion might be actually adopted by part time schools and thus become of some practical value, they resorted to the very practical expedient of recommending that the suggestion be incorporated in bar admission requirements. Viewed in this way the carrying of this recommendation into effect is not impossible or indeed very difficult. We fail, therefore, to see how this recommendation is subject even to the mild criticism of Mr. Reed; unless we are prepared to accept as valid, what we have already pointed out appears to be the fundamental dogma of the report, that there should be no formal requirement of any kind for improving educational practices by raising standards for admission to the bar.

Of very great interest and value are those portions of the report dealing with the relation of the Bar Associations to legal education and bar admission. President Pritchett in his preface to the present volume truly says (p. 17):

> There is a widespread impression in the public mind that the members of the legal profession have not, through their organizations, contributed either to the betterment of legal education or to the improvement of the administration of justice to that extent which society has the right to expect. Whether that impression be ill-founded or not, it is clear that the bar as a special group, and in some respects a privileged group in the social order, will today be called upon for a sincere self-

examination of its duties to society, and its relation to the realization of justice.

The bar in America has always assumed to exercise a large measure of control over admission to the bar and upon it must rest the principal responsibility for the present unsatisfactory condition of our system of legal education. Not unnaturally such influence as the bar has been able to exert on matters educational has been exerted through the bar organizations but the story of their relation to legal education the author finds to be largely a record of duty unperformed and opportunity neglected.

This he attributes to three defects in the organization of our bar associations. They are, first, the division of the profession into mutually independent bar associations; second, the small representations of the profession as a whole in bar associations without any clearly definable basis for the claim of this small number to represent or lead the great body of the profession; and third, the lack of any satisfactory contact between bar associations and the law schools.

Some of the author's comments on these weaknesses and their relation to our immediate problems should be pondered by those responsible for the present-day activities of our bar associations. He says (pp. 214-215):

> The diffusion of professional responsibilities among national, state and local organs has made it no one's especial business to initiate a needed reform. It has made it every one's business to point out defects in such constructive proposals as occasionally are made. The associated lawyers, having no single recognized mouthpiece, would set up a discordant clamor if they really raised their voice. This is one of the reasons why, so often—let it be said without offense—they emit only a gentle buzz, made up in large part of platitudinous generalities.
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> . . .
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> This, then, is the first and most important characteristic of the newly organized legal profession that has grown up since the Civil War, and the characteristic that especially distinguishes it from the older medical organization—the fact that it is a loose conglomerate rather than an integration of local, state and national units. Out of the wreckage of attorneys admitted to the bar, under the liberal admission rules prevailing in all the states, something resembling a genuine legal profession, based upon the selective principle, has indeed emerged. But it is a profession so disunited within itself as seriously to impair its capacity even to formulate—let alone to realize—professional ideals.
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> A second continuing characteristic of the new profession has been the small proportion of practitioners that belong to it. As late as 1910 the American Bar Association included only three per cent of the total number of lawyers in the United States, as compared with over twenty per cent of physicians then paying dues to the American Medical Association. Since then there has been a great increase, due largely to the efforts of a new membership committee appointed in 1912 and supported by liberal appropriations. Yet even today the membership is only about nine per cent of the total number of lawyers.

And after pointing out the lack of organic connection of bar associations with the law schools he says the tendency of bar meetings "what with banquet and debate" is to give "scant attention" to the recommendation of the educational committee:

> Whatever may be the correct attitude as to this [night law schools] and as to other problems that profoundly affect the law schools, and therefore our entire system of legal education and admission to the bar, it is certain that these matters cannot be settled by associations whose authority to settle them is not recognized by the law schools themselves. For although the schools, in the aggregate, constitute as much of a hodge-podge as the existing membership of bar associations does, individually they are often more firmly established and enjoy greater prestige, both with the public and with influential practitioners.

The action taken by the American Bar Association as well as that of the New York State Bar Association and the New York City Bar Association, all within the past year, give cause for hope that these estimates of the activities and influence of bar organizations, in matters of legal education, may require some revision at no distant date. Mr. Reed in his article to which reference has already been made, is at some pains to point out the minor differences in the recommendations of the three associations. But the important thing about them is not their minor differences but their agreement and singleness of aim in seeking to raise educational standards for admission to the bar and that they do either require some college education of candidates for admission to the bar or encourage them to use some of the increased period of prerequisite education in acquiring liberal training in a college. That differences should have occurred in the precise method of accomplishing the thing sought or in fixing the precise limits of this "step in advance" among organizations working independently is neither surprising nor cause for concern. The American Bar Association because of its national character is now in a position to take the lead in this movement. We believe that the simplicity and sanity of its recommendations as well as its natural position of leadership will win to it the support of local organizations and bring about the elimination of the minor differences of opinion as to the method and exact limits of improvement. But even if a state bar should bring about improvements in its own state by raising educational standards in ways not precisely identical with those recommended by the American Bar Association, we do not fear that the cause of legal education and a better bar would be irreparably injured. The time has now come for all bar organizations and all those interested in the improvement of legal education to support the wise and temperate recommendations of the American Bar Association,—at least to the extent of working for some improvement in an intolerable situation without wasting too much time on the emphasis of differences which are relatively unimportant.

The remedy proposed by the report for the defects in the organization of bar associations is the creation of a selective bar association, the selection to be made on the basis of high grade educational qualifications for all candidates for admission. The matter is stated as follows:

> Between the product of a strong university law school, resting upon a certain amount of liberal education, and a young man who has secured just enough training to be admitted to the bar, there is a gulf, which their subsequent experience in practice is more likely to widen than to bridge. To expect individuals so different from one another to be able to cooperate, on an equal footing, in a professional way is to expect what, except in the rarest instances, never can be and never ought to be, so long as we look to education to mould character. The comparatively untrained man may be equally worthy, and in his own line of work equally competent. But if the one who has enjoyed the greater opportunities has not in many ways grown apart from the other, and if, in particular, he is not the better qualified to discharge professional responsibilities in the spirit of *noblesse oblige*, then American higher education is indeed a failure. The truly democratic attitude for the bar associations to adopt would be to recognize that the community needs a greater variety of legal practitioners than can be made to cohere into a single professional class; and the truly democratic method of selecting the members of such a class out of the wider practitioner group would

be for the associations to require stiff educational qualifications for admission into their own number.

One of an inquiring turn of mind will be inclined to ask just here why, if this is the truly democratic method of selection of the group which is to exercise dominating influence in the profession, a somewhat similar method of determining admission to the bar practically adjusted so as to insure the admission of the fit representatives of all classes is not equally democratic?

Whatever the proper answer may be (and as we have already pointed out this report does not make it) there can be but little doubt that if our bar associations could be organized in the manner suggested they would gain a homogeneity, a capacity for concerted action and a power for leadership which they do not now possess. That our bar associations will ever be reorganized on such a basis, however, will seem to the practical minded observer highly improbable. To the average man the exclusion from membership in the organization which aspires to leadership in the affairs of the profession of which he is a member would seem more undemocratic than the legal requirement that every candidate for admission to the bar should meet such minimum educational requirements as will reasonably insure fitness for the performance of those functions of the profession to which he is to be eligible.

The recent action by the American Bar Association in approving a plan for raising the educational standards for admission to the bar and for classifying law schools seems to indicate that the process of education through which we have been passing in recent years is about to bring forth fruits. It seems reasonable to believe that the hope for improvement of the bar lies in this direction rather than in the expectation that there will be any general recognition of the utility or desirability of maintaining our present low standards and unsatisfactory methods by adopting the device of two types of bar examinations, the one for the thoroughly trained, the other for the superficially trained, candidate. The low grade schools which have thriven under existing conditions and thus thriving "have done more harm than good" may take comfort from this and other proposals of the Report. They can surely afford to wait, with serenity unperturbed, such reforms as may be inaugurated in the distant future by bar associations reorganized with a membership chosen on the basis of stiff educational qualifications.

But those who are deeply interested in the improvement of the bar and in strengthening of our system of legal education and who still have faith in the capacity of democracy to secure efficiency in its agencies for law administration will experience a sense of disappointment as they turn the pages of this report and realize that now after eight years when the American Bar Association and numerous other bar organizations are formulating definite and well considered plans for raising standards and strengthening our educational system, the results of this educational study are so vague, so inconclusive with respect to fundamental matters, and so wanting in suggestions of practical value at the present juncture. Perhaps more may be hoped for in a volume yet to be published which is to contain a more intensive survey of the contemporary situation but this, it is to be feared, is a vain hope since the introduction to the present volume tells us that "recent detail has been eliminated [from the present volume] in order to make clear the general principles in accordance with which future development will proceed."

A considerable portion of the present volume deals with the more technical problems of legal education such as the organization of the law school curriculum, the elective system, methods of examination in law schools, the relation of technical law study to the study of the border line subjects such as economics and the social sciences. As these topics are not of general interest to the practicing bar they will not be discussed at this time.[2]

Many other questions of great interest to the bar and to legal educators are discussed. Perhaps most important among them is the clear and convincing presentation of the necessity of liberal pre-legal education to the man who would really prepare himself for the responsibilities of his profession. The author is strongly of the opinion that liberal education is a necessary preparation for the lawyer although he seems to think that it is of comparatively little value in preparing the student for the work of law schools. If in this opinion he means the work of law schools of the scholarly type, we doubt whether many will concur in it.

The important contribution of the report is, after all, that it presents squarely for consideration and ultimate decision the question whether we are to leave things about as they are with the definite knowledge that they have been progressively growing worse, or whether we are to make an attempt to classify the bar, the democratic principle notwithstanding, or whether we are to assist in carrying forward the program of the American Bar Association to raise standards and classify the schools. We believe that a thorough study of the subject will leave no doubt in the unprejudiced mind as to the course which should be adopted.

2. This portion of the report will be commented on by the writer in a review in a forthcoming number of the *Columbia Law Review*.

Honorary Degrees

The fact that an unusual number of distinguished foreigners have recently visited the United States, has led to a considerable conferring of honorary degrees and as usual that of LL.D. is the one most commonly selected. No one begrudges to Marshal Foch and other visitors of scarcely less fame and international service any tribute of private or official esteem which it is within the power of the nation to bestow. But why levy exclusively on the lawyers? No one has conferred the honorary degree of D.D., though the Marshal, albeit of the Church Militant, is at least as good a preacher as he is a lawyer. The degree of M.A. would be even more appropriate in view of his linguistic pre-eminence, for as he is reported to have said when called to the Conference at Spa, he is the only man who speaks a language which Germans can understand. But in all seriousness, the use of a college degree for the double purpose of attesting scholarly attainment and of honoring a recipient without regard to his attainments in that particular field tends to deprive the degree of its value for any purpose. The custom probably had its origin at the time when the degree of an English university conferred certain civil privileges on its holder. It is akin to a grant of the freedom of a city which was a significant and substantial honor when cities were not free to all comers.—*Law Notes*, Dec. 1921.

CHAPTERS FROM THE CLEVELAND SURVEY

Historical Background Necessary to Understanding of Administration of Criminal Justice in American City—Study of Operation of Criminal Courts in Cleveland, and Recommendations for Improvement

Lack of space prevents a complete presentation of the findings of the Cleveland Survey of the Administration of Criminal Justice in the Journal. That survey, as is well known, covered the main aspects of this important subject: Prosecution, The Criminal Courts, Medical Science and Jurisprudence, Police Administration, Correctional and Penal Treatment, Legal Education in Cleveland, and Newspapers and the Administration of Justice. It would indeed have been possible to print comment on the main conclusions in all these different fields, so well covered by the investigators; but such a mode of treatment would have been at the expense of a clear presentation of those concrete findings which afford the best basis for the consideration and the conclusions of others. It was, therefore, decided in this issue, at least, to confine our article to the study of the criminal courts by Mr. Reginald Heber Smith and Mr. Herbert B. Ehrmann, of the Boston Bar, and to certain parts of the summary of Prof. Roscoe Pound, dean of the Harvard University Law School, and one of the directors of the survey, giving an idea of the peculiarly American difficulties in the administration of criminal justice.

I. The Historic American Legal Background

UNDER the head of "American Difficulties" the summary of the Report of the Cleveland Foundation gives the American legal background of the present-day problem of enforcing the criminal law. It begins as follows:

> To understand the administration of criminal justice in American cities today we must first perceive the problems of administration of justice in a homogeneous, pioneer, primarily agricultural community of the first half of the nineteenth century, and the difficulties involved in meeting those problems with the legal institutions and legal doctrines inherited or received from seventeenth-century England. We must then perceive the problems of administration of justice in a modern heterogeneous, urban, industrial community and the difficulties involved in meeting those problems with the legal and judicial machinery inherited or received from England and adapted and given new and fixed shape for pioneer rural America.

Some of our worst legal abuses, we are told, are due to transferring to our now large and crowded cities maxims and usages which were convenient and harmless in pioneer times. Our judicial organization and the great body of our legal institutions and common law are the work of the last quarter of the eighteenth century and the first half of the nineteenth century. For practical purposes American legal and judicial history begins after the Revolution, as in Colonial America the administration of justice was at first executive and legislative. American law reports begin at the end of the eighteenth century. But the America for which seventeenth-century English legal institutions and eighteenth-century English law were received and made over was not at all the America in which those institutions and that law must function today:

> Our Anglo-American judicial and prosecuting organization, criminal law and criminal procedure, as they grew up and took shape in the fore part of the last century, presuppose a homogeneous people, jealous of its rights, zealous to keep order, and in sympathy with institutions of government which it understands and in which it believes—a people which, in all matters of moment, will conform to the precepts of law when they are ascertained and made known, which may be relied upon to set the machinery of the law in motion of its own initiative when wrong has been done, and to enforce the law intelligently and steadfastly in the jury-box. In other words, they presuppose an American farming community of the first half of the nineteenth century. We are employing them to do justice in a heterogeneous, diversified, crowded city population, containing elements used to being trodden on by those in authority, ignorant of our institutions, at least in all but form, with good reason suspicious of government as they have known it, and hence often imbued with distrust of all government, loth to invoke legal machinery, of which they think in terms of the social conditions in another part of the world, and inclined to think of a jury trial as some sort of man hunt, not knowing the nature of the proceedings that have gone before nor appreciating the manifold guarantees by which at common law an accused person is assured every facility for a full defense.

Dealing with the administration of criminal justice in the first half of the nineteenth century, the summary calls attention to the different type of criminal and different conditions of crime for which our formative institutions were shaped. The occasional criminal, the criminal of passion and the mental defective were the chief concern of the criminal law, and its task was to restrain them in a homogeneous community under pioneer or rural conditions, in a society little diversified economically and for the most part restrained already by deep religious conviction and strict moral training. Commercialized vice was unknown. Large cities with a shifting industrial population, extreme divergence of economic conditions, and rapid and easy communications with other centers did not afford opportunities for specialized professional crime such as has come upon us in various parts of the country. And where it has come it has found an administrative and judicial machinery made for rural communities and simply added to or patched from time to time to meet special emergencies. The professional criminal has learned readily to use this machinery and to make devices intended to temper the application of the criminal law to the occasional offender a means of escape for the habitual offender.

We inherited from England the medieval system of sheriffs, coroners and constables devised originally for a rural society and easily adapted to pioneer rural conditions. The police force of today was unknown but unfortunately its organization and administration have been affected to no small extent by ideas derived from the older régime. What is particularly noticeable

about the nineteenth-century Anglo-American system is its lack of organization, decentralized responsibility and abundant facilities for obstruction in comparison with means for effective achievement of results. As a rule, none of the officials was answerable to any but the electorate, and he cooperated with other officials or thwarted them as his fancy or the exigencies of politics might dictate. This decentralization and division of power was part of the system of checks and balances to which we pinned our faith in the last century. But

> in a crowded, urban society, in holding down the potentially sinful administrative official we give the actually sinful professional criminal his opportunity, and in insuring a latitude of free individual self-assertion beyond what is required for the upright, we give a dangerous scope to the corrupt. The local conditions of cities demand centralization and organization of administrative agencies, coordinations of responsibility with power, and reliance upon personality rather than upon checks and balances as emphatically as a pioneer, rural community demands decentralization, division of power, independent magistracies, and checks upon administration.

The character of English criminal law at the Revolution had a special effect on the administrative system built up by America at the end of the eighteenth and in the first half of the nineteenth century. When the building process began the memory of the contest between Court and Crown in seventeenth-century England, of the abuse of prosecutions by Stuart kings, and the extent to which criminal law might be used as an agency of religious persecution, was still fresh. The problem therefore seemed to be, a hundred years ago, to hold down the administration of punitive justice and protect the individual from oppression under the guise thereof, rather than how to make criminal law an effective agency for securing social interests. Moreover, one part of the English law as regards crimes was harsh and brutal and another part seemed to involve dangerous magisterial discretion. American apprehension produced, therefore, three important results:

> (1) They led nineteenth-century American law to exaggerate the complicated, expensive, and time-consuming machinery of a common-law prosecution, lest some safeguard of individual liberty be overlooked. It is only thus that we may understand the many steps set forth in Chapter III of the report upon the Criminal Courts.
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> (2) They led to curtailings of the power of the judge to control the trial and hold the jury to its province, and to conferring of excessive power upon juries. These had their origin in colonial America, before true courts and judicial justice had developed, when juries were a needed check upon the executive justice of royal governors. They were added to through the need of checks upon royal judges. They were carried still further during the hostility to courts and lawyers and English legal institutions that prevailed immediately after the Revolution. Finally, they got their fullest development in frontier communities in the nineteenth century.
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> (3) Both had the result of enfeebling the administration of criminal law. But these enfeeblings did not work much evil in a time when crime was relatively rare and abnormal; when the community did not require the swift-moving punitive justice adjusted to the task of enforcing a voluminous criminal code against a multitude of offenders which we demand today.

Not only was the substantive criminal law brutal at the time of the Revolution, but English criminal procedure had been brutal and unfair to the accused. The trial methods of seventeenth-century prosecutors and the conduct of seventeenth-century trial judges, imitated by some royal judges in eighteenth-century America, led to the stringent provisions in our bills of rights for the protection of accused persons and for securing them a fair trial. Except in political prosecutions, criminal prosecutions in the English polity were privately conducted, nor was there any review of conviction except for error on the face of the formal record and no granting of new trials to the convicted. These conditions were changed in American law:

> A local public prosecutor was set up in each locality. The practice of review of administrative convictions before colonial legislatures and granting of new trials by colonial legislatures after judicial judgments made us familiar with review of criminal proceedings and led to a system of criminal appellate procedure. But the local prosecutor, the model whereof is the federal district attorney of the Judiciary Act of 1789, while suggested by the French "procureur du roi," was not made part of an organized administrative system, but instead was given complete independence as a sort of attorney general in petto. In the federal system a certain control is had through the federal department of justice. In the States there is no such power. The local prosecutor and the attorney general may cooperate or may ignore each other or may clash as their dispositions or their politics lead them. The wide powers of local prosecutors, the lack of control over them, and the extent to which they may determine the whole course of law enforcement, without leaving a tangible record of what they have done and what they have undone, are beginning to attract attention.

Curiously enough, the review of convictions and the granting of new trials by appellate courts, for which provision was made in America, had the effect of enfeebling the administration of criminal law:

> Review of convictions and granting of new trials by appellate courts were called for, especially in America, because of the need for judicial finding and shaping of the law which we were receiving from England and adapting to our conditions. When James Kent went upon the bench in New York in 1791 he tells us that there were no State law reports and nobody knew what was the law. Later there was need of judicial interpretation of the criminal codes which became common in the United States after the mode of the French penal code of 1810. But this institution had the effect of enfeebling the administration of criminal law in that settlement of the law was then more important than punishment of the individual offender. Thus, in the second half of the nineteenth century, when the law had become settled, new trials were granted constantly on academic legal points although no doubt of guilt could exist. There has been a marked change in this respect in the past two decades. Yet the function of finding the law for a pioneer community whose criminal law is formative, as the real function of a criminal appellate tribunal rather than reviewing guilt or innocence of the accused, has impressed its spirit upon our whole system of review of convictions. How much it still affects our administration of justice may be seen by comparing the reported decisions of an American Supreme Court with those of the English Court of Criminal Appeal.

While English judicial organization at the time of the Revolution was too arbitrary and involved to be taken as a model and followed in detail in this country, yet it furnished a general outline which was the model of our system of courts. For the purpose of criminal justice beginning at the bottom of this was:

> (1) Local peace magistrates and local inferior courts with jurisdiction to examine and bind over for felonies and a petty jurisdiction over misdemeanors, subject to appeal to and retrial in the court of general jurisdiction; (2) a central court of general jurisdiction at law and over crimes, with provision for local trial of causes at circuit; (3) a supreme court of review. The defect in that scheme that appealed to the formative period of judicial organization was not its lack of unity, the multiplicity of courts or the double appeals, but its over-centralization for the needs of a sparsely settled community that sought to bring justice to every man. In a community of long distances in a time of slow communication and expensive travel central courts entailed intolerable expense upon litigants. Judicial organizations were devised with a view to bringing justice to every man's door. But the model was English at a time when English judicial organization was at its worst. For in the eighteenth century the English had not yet overhauled their system of courts. It had grown up by successive creation or evolution of new courts when new types of

work arose or old tribunals ceased to function efficiently, so that some 74 courts existed, 17 of which did the work now done in England by three. Thus we took an archaic system for our model, and the circumstances of the time in which our courts were organized tended to foster a policy of multiplication. As a result, we go on creating new courts at a time when the conditions of our large cities call for unification.

A contributing factor in this decentralized judicial organization was the need of judicial ascertainment of the law in a new community already adverted to. We had to devise a body of substantive criminal law in a time of rapid expansion. For more than a century the main energies of our judicial system were devoted to the working out of a consistent, logical, minutely precise body of precedents. To us the important part of the system was not the trial judge who tried and sentenced the accused, but the judge of the appellate court who availed himself of the occasion given by the prosecution to develop the law. We judged the judicial system rather by the written opinions filed in its highest court than by the efficient functioning of its prosecuting machinery. Our eyes were fixed upon the task of providing rules. It is no wonder that our failure to devote equal attention to application and enforcement of rules too often allowed the machinery designed to give effect to the rules to defeat the purposes of law in their actual operation. If one reads the report upon the courts in Cleveland with this historic background in mind, he will understand many things. The rise of special problems, such as those which come before juvenile courts and our urban courts of domestic relations, the great increase in police regulations, especially of traffic regulations since the advent of the automobile, the increased opportunities for professional crime and consequent large-scale organization of criminal enterprises, the presence in our cities of large groups of aliens, as well as of citizens of foreign births, and no little race solidarity, the resulting colonies in our cities of large numbers of persons not trained in the ideas which our legal polity presupposes, and the complex economic organization, with its incidental results of recurring times of unemployment and continual inflow and outflow of laborers—all these things affect court organization as well as police and prosecutor. They call for strong peace magistrates, well organized and provided with ample facilities. They call for a single court of criminal jurisdiction, in which the steps in a prosecution may be reduced to a minimum—a court well organized and continually in session. All this is very far from the system we inherited from the nineteenth century.

Turning to the bench at the Revolution and in the nineteenth century Dean Pound calls attention to the fact that the administrative justice in Colonial America was at first executive rather than judicial. Judicial justice was only just establishing itself at the time of the Revolution and came to its own in the last decades of the eighteenth century and the beginning of the nineteenth century. In the Colonies the courts were manned by laymen, with the occasional exception of the Chief Justice. Many of the states relied upon judges without legal training until well into the nineteenth century. For instance, the Chief Justice of Rhode Island from 1819 to 1826 was a farmer. Three factors brought about a wholly different attitude toward the bench from that which has obtained in England since 1688:

> Here, as in so many cases in American legal and political institutions, we derive from seventeenth-century rather than eighteenth-century England. The politics-ridden bench of the Stuarts rather than the independent judiciary of modern England was the original mode. The federal constitution and the federal judiciary act of 1789 set a better model and, on the whole, the federal courts have kept to the best traditions of a common-law bench. Also the appointive State courts, with permanent tenure, at the end of the eighteenth century and in the first half of the nineteenth century, were manned by judges of the highest type, who made that period a classical one in the history of Anglo-American law. But the hostility to courts and lawyers due to economic causes after the Revolution, and the radical democratic movement of the next generation, with its leveling tendencies, its tendency to carry out abstract political theory to its logical conclusions, and its cult of incompetency, which is so often a by-product of democracy, combined to work a gradual change. Hostility to Federalist judges, some of whom, it must be admitted, followed the example of political judges in England too closely, had much to do with the first experiments with an elective bench. Thus a complete change took place in the mode of choice and tenure of judges which became general after 1850.

This change, of course, was the election of judges for shorter terms. In rural pioneer America the elected short term judge did not work badly, and today in rural jurisdictions such judges are on the whole reasonably satisfactory, but the elected short term bench has not achieved what its adherents expected of it and has achieved some other things which have had a bad influence upon administration. Debates in constitutional conventions show that advocates of the elective short term system expected to put judges in close touch with the people, to subject them to the pressure of popular criticism and to liberalize the administration of justice. What the new system of choosing judges actually did was to subject the bench to professional political pressure, to make it responsive to political considerations rather than to public opinion and, in the long run, to insure at most a mediocre bench, which has proved more narrowly technical and on the whole less liberal in practice than appointed judges with permanent tenure in the few jurisdictions which retain that system. Judges elected for short terms soon lost effective control over the administration of justice and common-law traditions of legal proceedings became seriously impaired. The summary continues:

> Lack of control over the trial bar on the part of judges who cannot afford to antagonize and cannot insist upon expedition and high ethical forensic standards of conduct without imperiling their positions is a chief cause of the unnecessary continuance and postponements, the difficulties in obtaining juries, the wranglings of counsel and the ill treatment of witnesses which have cast discredit upon American criminal trials. It is significant that these things are almost unknown in jurisdictions in which judicial tenure is permanent and secure.
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> Moreover, the putting of the bench into politics and the modes of thought of the pioneer result in breaking down the common-law standards of decorum and of judicial propriety. How far this decadence of dignity and decorum may go is strikingly illustrated in the report on Criminal Courts. The habitual presence of the higher type of lawyer in the civil courts has prevented such things as are of common occurrence in inferior criminal tribunals. But the judicial Barnum and even the judicial mountebank are well known characters in most American jurisdictions today, and they are fostered by a system under which, in the large city, a magistrate must keep in the public eye in order to hold his place. . . .
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> That the public should see and feel that justice is done is scarcely less important than the actual doing of justice. Order, decorum, and judicial dignity, in fact, promote the despatch of business. More than this, they promote respect for law and confidence in the work of the courts. No one should wonder at the prevalence of perjury in courts so conducted as to make the administration of oaths and the giving of testimony perfunctory acts, done off-hand in the midst of Babel. No one should wonder at the lack of public confidence in the administration of justice by courts which appear to be conducted by whispered and confidential communications with politicians and criminal-law practitioners of doubtful repute, rather than by solemn public proceedings in open court. All these things are natural results of putting the bench into politics under the conditions of the modern city.

At the Revolution the bar was hardly more than beginning, although there were a few good lawyers in more than one colony at that time. After the Revolution, law and lawyers were in much disfavor. The law could not escape the odium of its English origin, and the lawyers were disliked because they alone seemed to thrive in the economic disturbance and disturbed

conditions that followed peace. These circumstances and the radical democratic notions of the Jeffersonian era determined our professional organization. The summary continues:

> Three stages may be perceived in the development of the American bar. The first stage is marked by the leadership of the trial lawyer. The great achievements of the bar were in the forum, and the most conspicuous success was success before juries in the trial of criminal cases. The bench and the legislature were recruited from the trial bar. The law was largely fashioned to be a body of rules for use in the trial of causes. This stage lasted until the Civil War and still persists in some rural communities. In a second stage leadership passed to the railroad lawyer. The proof of professional success was to represent a railroad company. The leaders of the bar were permanently employed as defenders in civil causes and their energies, their ingenuity, and their learning were exercised in defeating or thwarting those who sought relief against public service companies in the courts. But where the bench was elective, because of popular suspicion of those companies, judges and legislators were seldom chosen from these leaders. Hence criminal law became the almost exclusive field of the lower stratum of the bar, and the recognized leaders in ability and learning ceased to be the official leaders as judges, prosecutors, and lawmakers. Today leadership seems to have passed to the client-caretaker. The office of a leader of the bar is a huge business organization. Its function is to advise, to organize, to reorganize, and direct business enterprises, to point out dangers and mark safe channels and chart reefs for the business adventurer, and in our older communities to act, as one might say, as a steward for the absentee owners of our industries. The actual administration of justice in the courts interests him only as it discloses reefs or bars or currents to be avoided by the pilot of business men. Thus the leaders of the bar in the cities are coming to be divorced not only from the administration of criminal justice, but from the whole work of the courts, and the most effective check upon judicial administration of justice is ceasing to be operative.
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> It may be conceded that the economic causes which have turned the energies of the ablest and best trained in the profession into client-caretaking are inexorable, and that we may not hope to divert the leaders to less remunerative work and work of less magnitude with respect to the economic interests involved. But it does not follow that those who practice chiefly in the courts, and especially those who do the bulk of the work in criminal cases, should be uneducated, ill trained and undisciplined.
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> Corporate organization of the bar, as at common law, and as both branches of the legal profession are now organized in England, and proper educational standards, both preliminary and professional, are items of the first moment in any plan for improving the administration of justice in our large cities. In such cities there must be many lawyers of foreign birth or foreign parentage. To confine the practice of law to any group, racial or linguistic or economic, would be to exclude other groups from their just share in making, interpreting, and applying the law, and thus to deprive them of their just share in a polity which is primarily legal. But it is vital that these lawyers should know the spirit of our polity; and that is the spirit of our common law. The mere rule-of-thumb training in local law and procedure or in meager generalities of definition and abstract principle which most of them now get in night law schools gives no adequate conception of our law nor our legal institutions. However good their intentions, they cannot use the machinery of a common law prosecution intelligently with such training, and it is no wonder that our legal system functions badly in their hands.

On the subject of penal treatment at the end of the eighteenth century the summary adds:

> Modern criminal science begins in the second half of the eighteenth century, after the classical treatise of Beccaria on crimes and punishments. But the movement for a rational and humane penal treatment which that treatise began did not affect our law till the end of the eighteenth century, when legislation began to provide imprisonment rather than death as a punishment for all but a few felonies. Thus our penal treatment was grafted on a system that proceeded on radically different ideas. The jail system, inherited from England, did not work badly in small country county-seats in the fore part of the nineteenth century, but became intolerable in the large city of the present century. The American Prison Congress was not organized till 1870, and the American Institute of Criminal Law and Criminology not until 1910. In other words, our system of penal treatment, experimental in its inception and grafted on a bad system, has had not much more than a century in which to develop, has been studied scientifically for not much more than a generation, and before it was much more than worked out for the conditions of agricultural America has had to be applied, as well as we might, to the predominantly urban America of today. These facts explain much more.

II. Present Conditions in the Criminal Courts

THE criminal law in Cleveland is administered by the Court of Common Pleas, which is the great trial court with criminal jurisdiction over felonies, the Municipal Court, which on its criminal side has jurisdiction over misdemeanors, violations of city ordinances and over the preliminary hearings in felony cases, and the Court of Appeals which reviews cases for errors of law only. The Municipal Court possesses a good form of organization, affording a machinery for the efficient dispatch of business far superior to that possessed by the majority of large American cities. The act which created this court and provided for a chief justice with power to order and arrange its business was hailed at the time of its adoption as a great constructive improvement by the most competent legal critics. Its misdemeanor jurisdiction is reviewable for errors of law only, thus preventing the evil of two trials on the merits. The Common Pleas Court, though lacking as excellent an organization as the Municipal Court, possesses power to make its own rules and regulate its business and is thus equipped to conduct its work in a reasonably efficient manner.

The report begins the study of how the system operates in practice by considering the influences which are evoked by an arrest, on a serious charge. It says:

> The instinct of self-preservation sometimes leads a felon to commit murder in resisting arrest, and once in custody, his whole being is concentrated upon the single idea of getting out. Parents and relatives, who had apparently given him up as a lost soul, rally loyally to rescue him from the penitentiary, often pledging their last cent for the purpose. Few felons are so disreputable that there is no one to fight for their liberty. The friends who do not come forward willingly are forced into line by every human incentive. It is often surprising how far and into what regions this active agency can penetrate. "Beginning in the slums, among the recidivists," observed the oldest judge on the Cleveland bench, "waves of influence are set up that reach higher and higher until they envelop respectability. Men with spotless reputations, whose motives cannot be doubted, will urge a judge to parole a professional criminal. How did they get there? The trail leads back to the slums—investigate the twilight zone." . . .
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> Another factor to be considered, partly the result of the foregoing and partly the result of many other causes, is the professional criminal lawyer. A poll of the bar of Cleveland shows that most lawyers dislike criminal practice, partly because of a feeling that it is detrimental to civil practice and partly because of professed ignorance or dislike of the required technique. The result is that a large part of the lucrative practice in the criminal courts goes to a small number of specialists. Considering all the Common Pleas criminal cases begun in 1919, we find 244 lawyers appearing in a total of 363 cases, no single lawyer appearing in more than three cases, against 89 lawyers appearing in a total of 842 cases, no one appearing fewer than three times. About one-fourth of the privately retained lawyers appeared in more than two-thirds of the cases. Twenty-eight lawyers appeared 10 or more times

each in 492 cases, or one-twelfth of the lawyers in considerably more than one-third of the cases. Moreover, many of this small group of professional criminal lawyers are in politics. Were the system as invulnerable as Achilles, these political criminal lawyers would find the penetrable heel.

Coming to the actual procedure of justice the first defect which the investigation reveals is that there are too many steps in it. To a layman or lawyer in civil practice the administration of criminal law means a jury trial in open court. What both fail to grasp fully is that the dramatic episode of a trial is relatively only a small part of the system. To begin with, the police themselves may release a man because of insufficient evidence or turn him over to other authorities. Once a man is held, however, the judicial processes begin to operate; and, taking into account the events that may occur before a case reaches the Common Pleas Court and after conviction, we have the following enumeration of different methods by which it is possible for a man charged with felony to escape under the guidance of an expert—to which should be added the fact that throughout this procedure there is always the possibility of the defendant jumping bail should his case assume a hopeless aspect:

Felonies—Municipal Court: 1. "No papers"; 2. "Nolle prosequi"; 3. Discharge, want of prosecution; 4. Discharge after hearing.

Felonies—Common Pleas Court: 5. "No bill" by grand jury; 6. Failure to arraign; 7. "Nolle Prosequi"; 8. Discharge, want of prosecution; 9. Not guilty after trial; 10. Plea guilty of lesser offense; 11. Suspended sentence; 12. New trial; 13. Appeal; 14. Parole from institution; 15. Pardon.

The business of justice, with all these avenues of escape open, we are told, is like a complicated game with the odds favoring him who has the more intense desire to win plus the skill of an expert on his side. As between defendants, the advantage lies wholly with the habitual offender, who has played the game before and knows the expert to employ. It is the business of the expert to work this system for weak spots and as soon as one avenue of escape by reason of public opinion or for any other cause is rendered more difficult, to turn to an easier method. Several cases from the files of the Bureau of Criminal Identification of the Cleveland Division of Police are presented as showing the ease and the astonishing length of time with which the more successful players of the game manage to win against the forces of law. But the table showing the disposition of felony cases, 1914-1920, from the records of the Division of Police, furnishes evidence of this sort in brief statistical form. The report thus comments on the figures:

> It happens that the period covered furnishes an opportunity to demonstrate the ability of the criminal lawyer to find the weak spots in the system. For some time before 1914, and for several years thereafter, Cleveland justice tended toward "sentimentalism," expressed by an excessive use of the "bench parole" (probation), more fully considered in a succeeding chapter. Shortly after the entry of this country into the World War the attitude of the public changed, and with the advent of the "crime wave" shifted to the opposite extreme. Judges responded by cutting bench paroles from 25 per cent of the sentences in 1914 to 7 per cent in 1920.
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> This gradual shutting off of the judicial "parole" forced the criminal lawyer to look elsewhere for relief. The principal sources of such relief were: (a) "nolles" in the Municipal Court; (b) discharges at the preliminary examination in the Municipal Court; (c) "no bills" by the grand jury; (d) "nolles" in the Common Pleas Court; (e) trial and acquittal by juries. A glance at the figures shows that all these sources have been called upon. Although the number of felony dispositions in the Municipal Court increased only 84 per cent from 1914 to 1920, the number of "nolles" in that court increased 140 per cent and the number of discharges 101 per cent. The number of dispositions in the Common Pleas Court increased 106 per cent in the same period, but the number of "no bills" increased 121 per cent, the number of "nolles" 506 per cent, and the number of trials and acquittals 600 per cent.

But perhaps the most unique of all the statistical illustrations of how the system is worked for weak spots is shown by the table which gives the disposition of cases of twenty-seven "political lawyers" compared with the disposition of all other cases begun in 1919 in the Common Pleas Court. This is perhaps the first time that the superior effectiveness of the political lawyer as counsel for a man charged with crime has been given statistical form. It is stated that the list contains the names of several high-minded men, but all of the names were pointed out by an unbiased observer familiar with the situation, as men who could unquestionably be classed as "political lawyers." Here is the table:

	Number of cases of 27 political criminal lawyers.	Number of all other cases.	Per cent of cases of 27 political criminal lawyers.	Per cent of all other cases.
Total cases	412	2,127	100.0	100.0
Total pleas of guilty	147	1,068	35.7	50.2
Original pleas of guilty	10	418	2.4	19.7
Original pleas of not guilty changed to plea of guilty	101	449	24.5	21.1
Original pleas of not guilty changed to plea of guilty of misdemeanor	33	160	8.0	7.5
Other pleas	3	41	0.7	1.9
Total disposed of by trial	127	463	30.8	21.9
Guilty of felony after trial	60	233	14.6	11.0
Guilty of misdemeanor after trial	17	57	4.1	2.7
Not guilty of felony after trial	50	165	12.1	7.8
Not guilty of misdemeanor after trial	...	8	....	0.4
"Nolled" on all counts	104	295	25.2	13.9
All other dispositions	34	301	8.3	14.2

The report points out the striking fact that nearly twice as many of the cases brought by these lawyers were "nolled" by the prosecuting attorney and 50% more cases tried by jury. The sagacity of the criminal lawyers may further be seen in the fact that they allowed scarcely more than a third of their clients to plead guilty, as compared with more than half of the others; that of those who did plead guilty proportionately only one-sixth as many pleaded guilty upon arraignment as compared with the others, showing a tendency on the part of the criminal lawyers not to surrender until they had made a deal with the prosecuting attorney, or until it was clear their cases were hopeless; that of those who pleaded guilty the proportion who were allowed to plead guilty to a lesser offense was half again as great as in the other cases.

The Bench is taken up next. The twelve judges of the Court of Common Pleas are nominated by direct primaries and elected by popular vote for a term of six years, and the ten judges of the Municipal Court are nominated by petition and elected by popular vote also for a term of six years. Their annual salaries are respectively $8,000 and $7,500. After a brief summary of recent changes in the mode of nominating and electing judges which led to the present system, the report says that these changes in the election machinery were a large part the result of the progressive wave which swept the country in the first decade of the century, representing a revulsion against the intolerable political conditions then flourishing. But it was impossible then to foresee all of the effects of the steps

proposed. Cleveland has now had ten years' experience of the wide-open method of selection, and although few would care to return to bossed party conventions, there is scarcely a man in Cleveland able to weigh the qualifications for the bench who does not deplore present tendencies and fear them. It continues:

> It is not altogether a question of comparing the intrinsic ability and integrity of the new judges with the old. Such a comparison might not be wholly unfavorable to some of the younger judges. Nor does the reason lie entirely in the fact that the judges are coming to the bench younger and less experienced than formerly, and that a few are markedly unsuited for judicial careers. These are symptomatic conditions only. Most serious is the present cheapening of the judicial office, so that neither the bar, the press, nor the judicial incumbents themselves any longer respect it. Young lawyers who would have viewed the bench with reverence formerly, now give voice to their disrespect, and retired and even sitting judges are openly cynical.
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> The situation is summed up in the universal comment that the judges are generally above the suspicion of taking direct money bribes, but find it difficult to forget the coming election. To judges who have had little or no private practice before beginning their public careers, the matter of insuring reelection is especially urgent.
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> Here again the trouble lies in attempting to adapt the democracy of the town meeting to a great cosmopolitan population. Direct nomination and non-partisan election of judges produce fairly satisfactory results in a small community, where everyone knows the nominees, and fitness for office is a matter of common appraisal. Judges from country districts are frequently sent to the Cuyahoga Common Pleas Court to help handle the crowded docket in that court, and Cleveland lawyers, on the whole, prefer these outside judges to the members of the local bench. Superior legal ability generally and greater disinterestedness are conceded to these country judges. In a community of nearly a million population, however, containing many voters who cannot even read English, it is not possible for more than a small proportion of the voters to know anything about the fitness for office of the numerous candidates for judicial office. This small group could carry the city by aggressive leadership, but so far there has been no such leadership. The result has been that a judge facing reelection has had to insure his survival through one or several of the following ways: Catering to petty bosses who control votes; patronizing certain influential groups—racial, religious, or industrial; general publicity in the newspapers or otherwise. Whichever way the premium is paid, the judge and his high office are degraded.

Touching on the last mentioned head the report says that editorially, newspaper support of candidates for the bench in Cleveland had in the main been wisely given. Whatever effectiveness the recommendations of the Bar Association and the Civic League have had is due chiefly to the cooperation of the press. But the real evil in the use of the power of the press lies not in its editorial policy, but in its news columns, where the daily publication of a judge's name may lead the public to vote for a judge as naturally and unreasoningly as it asks for the most widely advertised brand of soap. This naturally stimulates the tendency to self-advertisement in the judge. It continues:

> The continued advertisement of a judge's name—or the name of a prosecutor who would be judge—may take place without, and even contrary to, the wish of the editor. The newspaper reporters who cover the courts naturally want copy. The judges, too, desire copy and the combination, unchecked, is bringing the bench into a disrepute which attaches alike to the conscientious judge and the guilty "juggler" on the bench. The least judicial and most immoderate judges get their actions into the papers because "it's news," while strict and competent attention to judicial duties is too commonplace for mention. Several years ago a Municipal Court judge began to sentence traffic-law violators with such a heavy hand that he furnished copy to the reporters for weeks. A society woman receiving a workhouse sentence made "a story." In the fall this judge was a candidate for the Common Pleas bench, and although opposed by the press, led the field by a big majority, partly because of the advertisement he had received. A judge now on the Municipal Court bench started the same tactics in the winter of 1921, fining the liquor law violators—for the most part foreigners making "home brew"—unprecedented sums. The newspapers promptly responded with publicity. Many of the defendants were sent to the workhouse to work out fines ranging from $500 to $3,000 at 60 cents a day. These unfortunates were immediately dubbed "lifers," a fresh run of publicity started, with photographs and interviews. The judge then injected new life into the news by calling publicly for criticisms and suggestions. Evidently the comments he received were not wholly favorable, because he soon relaxed his campaign. As a matter of fact, by means of motions in mitigation, quietly allowed, this judge was not exacting greater penalties than his more moderate colleague in the next room, but of this the public was not aware. The man who paid his huge fine without making a motion in mitigation was penalized for not having a lawyer who "knew the ropes." The judge justifies his conduct on the ground that he never intended the large fines to be paid; that they were simply warnings and had a wholesome deterrent effect.

Another form of judicial publicity appears to be the exploitation of the Police Court, by which is meant the concession of the privilege of serving in that court to a judge who is soon to come up for reelection. Such service is regarded as a political asset. The advantage lies in the fact that criminal matters attract more attention in the newspapers and elsewhere than ordinary civil procedure.

The present Municipal Court was launched in 1912 with civic enthusiasm in the belief that Cleveland had finally attained a modern city court. It has in fact a unified form of organization which promotes efficiency, other things being equal. But the report finds the building inadequate and a notable lack of dignity and decorum. In one room in which court was being held an attorney was waving a cigar in the judge's face by way of emphasizing his argument. Lawyers, witnesses and officials were crowded around the bench almost screening the testifying witness from view. Others in the court room were standing about talking and were occasionally asked by the judge to be quiet in order that he might hear the testimony. In order to make themselves heard lawyers and others had to lean over the bench to address the judge, giving the impression of a confidential communication which, although false, lent color to the belief that certain lawyers have a "pull with the judge."

One of the assistant clerks has discretion to decide whether the list of cases in one room is so congested that cases should be transferred from one session to another. There are no separate sessions dealing with different groups of cases, as for example misdemeanors and ordinance violations, criminal in nature, felony examinations, women offenders, violations of ordinances quasi-criminal in their nature. There is scant attention to individual cases and continuances are entirely too numerous. These not only enable the guilty to escape, but play into the hands of unscrupulous lawyers who desire to use the criminal court to exact payment of a civil claim for damages. The report also finds "the motion in mitigation" employed extensively in the Municipal Court, and says:

> This motion, apparently peculiar to the police court, makes a farce of judicial business, more than any other single factor. After a defendant has been adjudged or has pleaded guilty, the court imposes sentence. To the uninitiated the case is over, but this is not so. A "motion in mitigation" is then made, which is sometimes granted the same day, after trial, and sometimes ruled upon weeks and even months later, after many continuances. Thus

the court satisfies the complaining witness in open court, and has the opportunity later to placate the defendant's lawyer. Lawyers report instances where their clients were found guilty, though clearly innocent (in the belief of the defendant's lawyer), and upon protesting against the "outrage" of a conviction, were advised to make a "motion in mitigation." This they did, and the motion was granted.

The "motion in mitigation" affords the setting for the performing judge, enabling him to do "stunts" which get into the front page of the newspapers, and then to undo the damage quietly at a later date.

Coming to the Court of Common Pleas, it finds that the physical conditions are a handicap to efficiency and that while the decorum is a considerable improvement over that in the Municipal Court, there is a notable absence of dignity of atmosphere. The criminal division of the court sits for three terms totaling ten months, there being no court in July and August, and disposes of more than 3,000 criminal cases a year. The court has twelve judges, and a varying supervisory control over various other offices. It is without any executive head whatever, the judges holding occasional meetings to discuss pending matters and by a process of rotation each judge becoming in turn presiding judge or presiding judge of the criminal division. The custom of rotating judges in these positions necessarily means a fluctuating policy with regard to the promulgation and enforcement of court rules and practice. Another result is to make it impossible to use the personnel of the bench to the best advantage. A judge may be inadequate on the civil side and yet make a competent criminal judge. Conversely a judge gifted in theoretical knowledge of the law may be a poor criminal judge because of his tendency to see abstract theories and not problems of human character.

In Cleveland assigned counsel play a large part, quantitatively in the administration of justice, but there is no fixed policy with respect to their appointment. As a rule young attorneys or incompetent older men are named, but in the important cases the judges seek to appoint abler men and some eminent lawyers have served on such appointments from a spirit of professional duty. Two years ago the office of assignment commissioner was created to take the management of the assignments out of the prosecutor's office and under the present commissioner the office has given considerable satisfaction to those who sponsored this change. The report further says:

To the credit of the County Clerk, the Common Pleas Court has been practically ridden of professional bondsmen. Through a recent statute limiting the number of bonds on which any individual may go surety, and creating the office of Bail Bond Commissioner, this great gain should be effectively retained in the Common Pleas Court and as effectively extended to the cases in the Municipal Court. Thus, one of the worst by-products of our criminal system is being eliminated in Cleveland, although the nefarious traffic is still profitably pursued just outside the portals of many other American courts of justice.

A special chapter is devoted to "suspended sentences," "nolles," and "pleas of guilty to lesser offenses." About 20% of all felony cases are "nolle prossed" in the courts, over 8% of those indicted are allowed to plead guilty to an offense less serious than the indictment, and from 10% to 30% of those convicted received suspended sentences. Obviously the judge should be in possession of aequate information before he can act with fairness to the defendant or the community, but under the existing system it may be only by chance he learns the true situation. The only source of information outside of the police officers, who are not the best advisers, in such case is the prosecuting attorney, and here again there is the danger of bias against the prisoner, of favoritism because of friendship for the defendant's lawyer, or because of political influence. And even if he is wholly impartial, he usually knows only the facts necessary to a conviction and very little of those "imponderables" necessary to a judgment on the question of probation. Deprived of the opportunity of forming their own judgments the judges are often prone to follow the clamor of the press or the public. When the cry is "thumbs up" paroles issue in abundance, but when it is "thumbs down" both the good and wicked travel the same road.

About 1917 when humanitarianism had reached its sentimental climax 254 men pleaded guilty or were convicted of felonies and 135 were paroled by the court. It should be remembered, the report points out, that these men were a selected bad lot, since by the decimating process of the system most of those who had anything in their favor had already escaped. Yet over 53% of this dangerous group went practically unpunished. This record is compared with the conviction book for the September term, 1920. In this term 257 men pleaded guilty or were convicted of felonies and 30 were paroled or a little more than 11%. This represents reaction to the crime wave and a revolt against "good fellowism." The contrast is a witness to the effect of public clamor upon the judicial mind in the matter of paroles, since there probably was about the same proportion of confirmed evil doers and notorious offenders in the 1917 term and the 1920 term. The report adds:

The judge who presided during the 1917 term has declared that 80 per cent of cases paroled never get into trouble again. Whether or not this is true, it does not justify paroling blindly. A too free use of parole certainly encourages others, if not the defendant himself, to "take a chance" where their "pal" got off so lightly.

It should always be remembered that the parole represents leniency to men proved guilty and involves no question of punishing innocent men with which it is often sentimentally confused. Every possible precaution should, therefore, be taken to protect the public from the 20 per cent who admittedly get into trouble again. In a court with proper facilities for obtaining information such a large percentage would not be freed to prey upon the community.

Commenting on the frequency of motions for a new trial as furnishing another possible avenue for escape, the report says that a study of the records shows in most cases there is no real intention to grant another trial. A table showing the outcome of all the new trials granted in a certain group is presented, and it points to the conclusion that the verdict was set aside simply in order to effect one of the many other adjustments. Only two cases of 41 new trials granted actually went to trial; 18 pleas of guilty to a lesser offense were accepted, 10 cases were "nolled," 6 defendants received a bench parole and other adjustments accounted for the rest.

The report notes much apathy towards the crime of perjury in Cleveland. It states that those familiar with the administration of justice in that city would probably agree that in the trials for the murder of Harold Kagy Cleveland is paying its penalty for that apathy. The statistics for the Common Pleas cases begun in 1919 yield impressive evidence of this callousness toward corruption of the court's process. Out of 27 indictments in 1919 for bribery and perjury combined only one was actually punished.

There are certain criticisms of the method of selecting juries, but the failure of the jury system is declared to have a deeper cause than any schematic de-

fect. In Cleveland, as in many other large cities, most citizens of means or intelligence avoid service. This avoidance has become traditional, so that it is a kind of mild disgrace for a so-called "respectable citizen" to allow himself to be called for jury service—like being swindled, for instance. The report gives some comparisons of wards composed largely of shifting white foreign and negro population and recognized prosperous suburbs to illustrate this contention—which, however, will be generally accepted without argument by most people familiar with the subject. In the winter of 1920-1921 the figures show that the jury box was a haven for the unemployed.

III. Recommendations

THE first recommendation for the improvement of the administration of justice in the courts is elimination of all unnecessary links in the chain and making those remaining as strong as possible. Three different judicial agencies are now asked to discharge the defendant because there is no prima facie case against him—the Municipal Court at the preliminary examination, the grand jury on presentment by the prosecutor, the Common Pleas Court on motion to discharge or for directed verdict. This constitutes unnecessary hardship on the witnesses who are called on to attend this multiplicity of hearings and continuances, and the State loses valuable testimony in the process of attrition. Moreover, this dragging out of cases is largely responsible for bail bond trouble, since a speedy trial would often do away with the necessity of bail. It is moreover an injustice to a defendant to put him in a position where he may be called upon to furnish at least three bonds. It is recommended that all steps in the Municipal Court, together with the grand jury be dropped. It should be enough if a judge finds there is probable cause to hold a defendant for trial and the judge might better be a Common Pleas judge than a Municipal Court judge. The grand jury proceeding might be retained for special investigation only. The report adds:

> The trinitarian aspect of felony jurisdiction is the product of historical causes only. In feudal England, when the Common Law system was beginning, the king sent his judges on tour throughout the realm, so that the court sat for a certain time only in each county. It became necessary for local magistrates to examine and hold suspected felons in the interim, and for a grand jury of neighbors to meet occasionally to examine into all crimes committed in the county as preparation for the coming of the court. This custom was carried into pioneer America. The function of holding suspected felons, admitting them to bail, and recognizing witnesses was conferred on justices of the peace. In 1852 this ad interim jurisdiction was conferred upon the police court of Cleveland, and this was continued in the Municipal Court Act of 1910. Today, however, the Common Pleas Court is permanently resident in Cleveland, and sits, or can sit, continuously throughout the year. Full exclusive felony jurisdiction could be conferred upon this court without any practical difficulty or injustice.
>
> It may be queried whether there is any reason for continuing jurisdiction over misdemeanors in the Municipal Court. After consideration of the Municipal Court's work in this respect, it is recommended that this jurisdiction also be conferred on the Common Pleas Court. Again the reason for the separate jurisdiction is historical, due to the necessity of disposing of minor causes promptly, without waiting for the "terms" of the higher court. The Municipal Court inherits through the police court and justices of the peace. It is not true that petty criminal causes may safely be entrusted to judges of inferior quality. Such cases may not require a high order of legal ability, they emphatically need men of high character on the bench; for no other court comes so close to the lives of the mass of the people, or has a greater opportunity to inculcate respect for our institutions.
>
> There are no legal difficulties in the way of transferring full criminal jurisdiction in all causes to the Common Pleas Court. The constitution provides simply that the jurisdiction of this court shall be fixed by law. All that is necessary is an appropriate statute.
>
> There may be more difficulty with respect to abolishing the grand jury and substituting therefor, if necessary, the prompt and compulsory information of the prosecuting attorney. Article I, Sec. 10, of the Ohio constitution provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury." A similar provision has been strictly construed. An amendment to the constitution of Ohio would be necessary to administer justice in metropolitan communities without the compulsory use of a grand jury. Such a result, however, would be well worth the effort. There is no difficulty with respect to the Federal constitution.

Tangible evidence of the advantages of a unified court is shown in the figures for the unified court in Detroit. In April, 1920, the entire criminal jurisdiction of the city was vested in one court, which constitutes the unified tribunal with plenary jurisdiction over all offenses—ordinance violations, misdemeanors and felonies. The direct influence of the unified court on the crime situation may be seen in the fact that the convictions for felonies rose from 51% for the year ending April, 1920, to 70% for the year ending April, 1921. These figures may be compared with the 4,262 felony cases disposed of by judiciary process in Cuyahoga County in 1919, of which 37.1% were convicted on plea or after trial.

With respect to the selection of judges in the usual course, the following methods are recommended in order of preference:

> (1) The appointive method, with provision for a retirement election whereby a judge runs against his own record.
>
> (2) A modified appointive method, as, for example, an elective Chief Justice who appoints his associates.
>
> (3) A modified elective system whereby judges are elected for a short first term, but if reelected, then for progressively longer terms. Judges standing for reelection should not run against other candidates, but only against their own records. The single question presented to the electorate should be "Shall this judge be retained?" If the judge is defeated, his successor should be chosen at the next succeeding election.
>
> These three recommendations, in order of preference, are probably in inverse order of probability of achievement. It is, therefore, most useful to consider the third suggestion. The provision for a short trial term gives the public an opportunity to learn what character of a judge it has chosen. If the short term record is satisfactory, the judge will be returned for a longer term, thus giving the community the benefit of his judicial growth and experience. By eliminating a campaign against rivals and confining a judge to the single issue of his service on the bench, it is hoped that many of the evils of electioneering will be eliminated and that a tradition will be established of giving practically a life tenure to able judges. Cuyahoga County has already established such a tradition with respect to the probate judges, who have been usually unopposed at elections. Such a tradition can be established for the other courts if the judgeships are not "scrambled" among a field of candidates.

The report further recommends a joint committee on the judiciary, to be composed of not more than three members of the executive committee of each of the major party organizations and of the Bar Association, and representatives of leading civic organizations. This joint committee should elect a slate of candidates to be supported at the primaries and at the initial and special elections. "From the cooperation which the press has given in the past to occasional joint efforts of this sort, such a plan would almost certainly be wel-

comed and supported by the great dailies of Cleveland."

On the subject of bail bonds the report states that the real evil in the situation is not the matter of easy bail, but the disreputable professional bondsmen who make a business of exploiting the misfortunes of the poor and whose connection with "runners" and "shysters" tends to prostitute the administration of justice in the inferior courts. To eliminate the professional bondsmen requires not a stiffening in the matter of bail, but a removal of the necessity of bail wherever possible and a relaxation where such a removal cannot be accomplished:

> A most beneficial step would be the establishment in petty offenses of beginning process by means of a summons instead of a warrant. It is absurd that known residents of Cleveland should be arrested for violation of traffic and other ordinances and for misdemeanors not serious in their nature. This not only provides opportunity for the professional bondsman and imposes unnecessary hardships upon the accused, but also involves an enormous waste of time by members of the police force, the clerk's office, and the jail attendants. In such cases it should be sufficient, if the policeman handed the accused a summons to appear in court upon a certain day. The summons has replaced the warrant in many other cities. In Detroit it has an extensive use and has proved to be a most successful labor-saving device. In that city a warrant is not issued unless the accused fails to respond not only to the original summons, but to an alias summons issued on the day of his non-appearance in court. In Cleveland an informal summons has already been established in the police prosecutor's office. In certain classes of cases, notably neighborhood quarrels and the like, the police prosecutor summons the party into his office in an endeavor to straighten out the difficulty without the intervention of the court. In theory, at least, this informal procedure is a considerable step forward, but it is obviously vulnerable to abuse and doesn't go far enough. The summons should not be a discretionary matter with the prosecutor, but should be made the normal mode of beginning of judicial process in certain classes of cases.
>
> There will always remain, however, a residue of cases in which a bail bond with sureties is necessary. The number of such cases may be considerably reduced by the prompt compulsory trial of cases and by the erection of a jail with decent and adequate facilities.
>
> These steps should reduce to a minimum the number of cases in which a professional bondsman may hope to make a profit. By eliminating the opportunity for such business, those who are now engaged in it will seek a living elsewhere. So far as it may be possible to eliminate the professional bondsman, his business should be regulated like that of the "loan sharks" in many jurisdictions.

With reference to the Municipal Court the report recommends—if it is to be retained as an institution—better facilities, removal of the sordid aspect of the surroundings, better decorum, a division of the cases into sessions according to the need and the requirements of decency, orderly handling of the list, a stricter rule as to continuances, abolition of the "motion in mitigation," a statute or ordinance fixing the charges of professional bondsmen, the formal beginning of processes in minor offenses by means of a court summons, and better record systems.

With reference to the Common Pleas Court, the report recommends the establishment of a permanent executive head with a modern court organization; certain physical changes; greater formality and dignity in the court room; elimination of the custom of "passing cases" except for urgent reasons; the establishment of a Voluntary Defenders' office under the joint supervision of the judges and the Bar Association; modification of the custom of jailing prosecuting witnesses; greater care in allowing bail to professional and habitual criminals; certain detailed changes in methods of keeping records.

Referring to the disqualifications of the police and prosecutor's office as the court's reliance in deciding motions to "nolle pross," questions of suspension of sentence, etc., the report recommends the establishment of an adequate probation department "which makes a business of studying offenders as human beings, which will make use of the excellent records kept by the Bureau of Criminal Identification, but round out these records as to offenses, and supplement them with the many considerations which never appear on a court docket." It continues:

> Such probation as there is in Cleveland—if what there is may be dignified by the name—is another proof of the rapid growth of the city and the apathy of its citizens toward the human aspects of government. One would have to travel far to find a great center which is guilty of such gross neglect. Three men and three women probation officers, forced to labor without clerks or stenographers, is the sum of what has been provided, and that grudgingly. These six are attached to the Municipal Court, none to the Common Pleas Court. Paroling defendants to relatives, detectives, clerks, and even stenographers in the prosecutor's office has made a joke of probation, but the Common Pleas Court has had no other agency afforded it. Mrs. Antoinette Callaghan and her two assistants in the Municipal Court understand their task and work hard over the women probationers, but theirs is an impossible problem. The men's Probation Department has apparently never been taken seriously by the city. Until James Metlicka came into office there was not, he says, even a system for recording payments, the checks being jumbled into a drawer or carried around in some one's pocket.
>
> These feeble beginnings for probation should not be made the basis of judgment on the institution. A totally new conception of probation must be grasped, and a professional staff, adequate in numbers and personnel, established. Salaries should be commensurate with the importance of the office, and no man is too big for head of the staff. Above all, the department must be kept out of politics.

It is further recommended that the motion to "nolle" should always be in writing, should specify the reasons for the refusal to prosecute, and no bench parole or "nolle" should be granted until ample notice that the court contemplates such action is delivered to the complaining witnesses, and delivered to the police officers in charge of the case. The "blanket nolle" should be absolutely limited to cases involving no exercise of judgment, as most of the cases in such motion are at present, namely, old cases in which bail is forfeited, defendants not apprehended, or previously sentenced or acquitted for the same act. Before the motion is allowed, copies should be delivered to the Bureau of Criminal Identification and to the press for publication.

With regard to motions for a new trial the report says:

> It is time for the judges of the Common Pleas Court to formulate a clear policy regarding new trials. The large number indicates—(a) poor quality of jurors; (b) weak or befogged charges by judges to the juries; (c) rearrangements to conform to the conscience of particular judges, but not to the law; (d) yielding to solicitation of the defendant's lawyer or relatives. A trial is not only an expense to the county, but, as has already been seen, it is a difficult matter to bring an accused as far as trial on the indictment. The steps in the administration of justice need drastic curtailing and not extension by a fictitious use of a new trial. The ends of justice will be served by confining this motion strictly within its legitimate scope.

The report suggests that the severity of the perjury statutes partially explains their non-enforcement. It recommends giving judges power to impose a lesser penalty, and an active campaign against offenders.

LEGISLATIVE PROBLEMS AND SOLUTIONS

The Prohibition Amendment and Consent Requirements and Time Limits—Shifting Theory of Control Expressed in Provisions of Packer's Act Concerning Administrative Findings of Fact—The Woman's Rights Amendment

By Ernst Freund

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WHERE a law makes the validity of an act dependent upon the consent or concurrence of a number of other agencies or authorities, the process of validation may not only take considerable time and create a prolonged condition of suspense, but during the waiting period circumstances may so change that some of those whose consent has been secured will find it desirable to reverse the position previously taken. A time limit in some form or other for the perfection of the requisite consents is thus eminently appropriate, and should always be provided for in framing a provision of this nature; and where the law is silent, the question will arise whether the time limit can be supplied by construction or otherwise.

The problem finds its most conspicuous illustration in the provision for the amendment of the federal constitution. It may take many years before the required consent of three-fourths of the states is finally secured, and during these years, public sentiment and the political complexion of state legislatures may undergo great alterations. In connection with the Fourteenth Amendment, two states withdrew their consents before the requisite number of states had acted, but since ratification eventually became perfect without their concurrence, the question of the power to withdraw became irrelevant.

When the Eighteenth (Prohibition) Amendment was submitted by Congress, Congress desired to give the states seven years within which to ratify, and no longer. The natural method of accomplishing this result would have been a time limit attached to the proposing resolution. Congress did not adopt this method; why not? because it had doubts regarding its power and resolved its doubts in the negative. It did instead what it had undoubted power to do, namely to submit an article framed in such a manner that the article itself carried a time limit for its ratification, just as the article might have attached to itself any other limitation or condition qualifying its operation; for there is absolutely nothing within the bounds of reason that a constitutional amendment duly adopted cannot legally accomplish. The resolution as adopted read as follows:

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following amendment to the Constitution be, and hereby is, proposed to the States, to become valid as a part of the Constitution when ratified by the legislatures of the several States as provided by the Constitution:

"Article —.

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

"Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

Champ Clark,
Speaker of the House of Representatives.
Thomas R. Marshall,
Vice-President of the United States and President of the Senate.

Had Congress believed that it possessed the power to set a time limit for ratification, the form would have been different. The proposed article would have stopped at the end of section 2, and there would have been no section 3; for what is now section 3 would have appeared as part of the Resolution. In other words after the end of section 2, the resolution would have continued:

> Resolved, that this proposal shall be inoperative unless the article proposed shall have been ratified as an amendment to the Constitution by the legislatures of the several States as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

For the sake of convenience, let us call the form in which the resolution was submitted, the actual form; the form suggested which was more natural but which Congress did not dare to choose, the questionable form. The difference between the two forms while legally all-important, is to the eye very slight, so slight that the casual reader might easily misread the actual form, as if it were the questionable form.

Now examine the case of Dillon v. Gloss, decided by the Supreme Court on May 16, 1921, and you will find that this is what happened. Both the counsel and and the court misread the resolution. Assuming the amendment to have been submitted in the questionable form, its validity was attacked, and against the attack, sustained by the court. The court decided a case that was not before it; it discussed and established a purely academic proposition.

The opinion refers to the debates of Congress. The *Congressional Record* shows that the time limit clause of the amendment in substantially its present form was introduced by Senator (now President) Harding and was opposed by Senator Borah, curiously enough under a misapprehension similar to the one entertained by the Supreme Court. While the distinction between an attempt to limit the ratifying power of the States by resolution of Congress, and a time limit incorporated in the terms of the amendment regularly submitted and ratified, was pointed out, it is easy to understand that those participating in an extemporaneous debate might have failed to grasp the exact

form and operation of the proposed clause, and the difference between two forms so closely resembling each other. It was probably the obscure draftsman who saw the difficulty, successfully avoided it, and was at his pains for nothing.

The Supreme Court holds that Congress possesses the power which it did not exercise. It starts from the proposition that it is a fair inference or implication from article 5 (the amending provision of the Constitution) that the ratification must be within some reasonable time after the proposal. "Of the power of Congress, keeping within reasonable limits, to fix a definite period for the ratification we entertain no doubt." (Note that under the actual form the most unreasonable time limit would have been valid.) "Whether a definite period for ratification shall be fixed, so that all may know what it is and speculation on what is a reasonable time may be avoided is, in our opinion, a matter of detail which Congress may determine as an incident of its power to designate the mode of ratification."

Few lawyers charged with the responsibility of drawing the submitting resolution would have dared to act upon the theory thus approved by the Supreme Court. The question whether a delegated power can be exercised with the qualification of conditions or limitations not expressed in the delegating instrument is one which is more likely to be answered in the negative than in the affirmative. In many cases the power to qualify is extremely desirable; no one will deny the desirability of a time limit in perfecting the required consents in an amendment to the federal constitution. The power which the Supreme Court attributes to Congress is a power which it ought to have. But a state legislature ought also to have the power to limit the operativeness of its consent in point of time pending the concurrence of other states; has it that power? What is the force of the decision in Dillon v. Gloss? It is a dictum, since the facts of the case did not call for the decision. It is a judicial, and not an obiter dictum, since the point was adequately discussed. It would be a hazardous thing to accept the case of Dillon v. Gloss as establishing a new principle in the construction of powers. But a future Congress will be justified in relying upon the decision, and the practice of attaching time limits to submitting resolutions may come to be adopted. This would have the advantage that a future amendment will not have to be encumbered by so awkward a clause as section 3 of the Eighteenth Amendment.

The Packers Act—Administrative Findings of Fact

The Packers and Stockyards act, 1921, like other recent measures for the control of business, follows in essential respects the method of the Federal Trade Commission act. Instead of directly penalizing, as the Sherman Anti-Trust act does, the practices which it aims to combat and suppress, it sets up an administrative agency to deal with cases as they arise, establishing upon complaint and after inquiry the illegality of a practice and prohibiting its continuance. The penalties of the act attach only to violations of specific orders. This is supposed to combine better justice with greater effectiveness of public restraint.

The Packers act departs from the Trade Commission act by substituting for a commission the Secretary of Agriculture. We associate the new government control of business with administrative commissions. The commission form was intended to express the quasi-judicial spirit in which that control was to be exercised. A future historian will determine whether this judicial spirit was maintained by the Interstate Commerce Commission in the regulation of railroad rates, whether it could have been maintained in view of the fact that the relatively unorganized shipping interests had no representation other than the Commission. Still the Commission form, as a consequence of its organization and procedure, cannot help impressing to some degree at least upon the members of the Commission that they are not mere instruments of public policy.

But the head of our executive department is a political officer and an instrument of public policy. As an executive officer he is supposed to promote definite views of public welfare, not merely to hold the balance even between conflicting interests. If Congress then vests the supervision and regulation of a private business in an executive officer, it must be presumed to have shifted the theory of control. The reasonableness of a business practice will somewhat depend upon whether you judge it from the point of view of profit or of service, and in equal good faith different definitions of unreasonableness may result according as the definition proceeds from a slightly biased or from an entirely impartial point of view.

The shifting theory of control finds expression in a provision differing from the analogous one of the Federal Trade Commission act. The latter act makes the findings of fact of the commission conclusive in a suit to enforce the order, and the court rules only upon questions of law. The Packers act makes the findings of fact of the Secretary of Agriculture merely prima facie evidence in the enforcement proceedings, permitting the court to reverse on the facts as well as on the law. Considering to what extent facts enter into the correct judgment of business practices, the change is certainly desirable. It might indeed be urged that even the presumptive truth of adverse findings unduly prejudices the business; but the answer is that the department finding is not ex parte but after a hearing; and that even without a statutory presumption courts are inclined to treat administrative findings of fact on technical points very much as they do the verdict of a jury.

It is, moreover, submitted that the resulting difference between the Packers act and the Federal Trade Commission act is not sufficiently justified by the difference in the form of the governmental agency that has been pointed out. Notwithstanding the commission form, the entire system of administrative commissions was in its beginnings attacked on constitutional grounds as violating the principle of separation of powers. The courts did not sustain this contention, but it has never been denied that in the administrative commission executive and judicial functions are to a certain extent commingled, and the danger or inconvenience of this incompatibility needs to be guarded against. It is too early to say how this problem will be worked out ultimately; but the least that the law can do is to provide the fullest opportunity for court review.

The conclusiveness of findings of fact must, therefore, be pronounced a serious defect of the Federal Trade Commission Law. It was intended as a provision for facilitating the accomplishment of the objects of the law; but the reverse will be found to be the case. The commission undertakes an impossible task if it attempts to be prosecutor and judge at the same time. Where it starts of its own motion on an

inquiry into alleged business malpractices, it cannot in the nature of things escape the suspicion that the spirit of the investigation will not be absolutely impartial. But public confidence in administrative fairness is the indispensable prerequisite for the success of the new régime of government control of business.

The Proposed Women's Rights Amendment—Legislation Through the Constitution

It is often charged that recent American constitutions usurp the functions of legislatures; but a critical examination will show that a tendency toward such usurpation is checked by the inherent difficulties in the way of legislating by constitutional provision. There is a good deal of unnecessary detail in constitutions that hampers and embarrasses legislation; but when the people desire to accomplish through the constitution a direct result independent of legislative assistance, they overlook the fact, more potent than the constitution itself, that there are few propositions of law that can be made sufficiently brief for constitutional formulation, and at the same time self-executing. Something can be accomplished by a sweeping prohibition like that of the Eighteenth amendment, operating by its own force; for at least it will ipso facto outlaw the traffic in intoxicating beverages, making contracts of sale and purchase unenforceable; but for a greater effect than this, which would leave a very thriving outlaw traffic, enforcing legislation is required.

Much more "self executing" than the Eighteenth is the Nineteenth amendment securing woman suffrage. A purely enabling provision, striking out a discriminating limitation from a highly organized system of voting rights, it is theoretically operative without any legislative aid whatever, and even practically adjustments will on the whole be required only insofar as the doubling of the number of voters will present administrative inconveniences.

Very rashly the advocates of women's rights have jumped to the conclusion that civil and political disabilities stand on the same footing, and can be disposed of with equal brevity. They now propose an amendment to the federal constitution, which is to read as follows:

> No political, civil, or legal disabilities or inequalities on account of sex or on account of marriage, unless applying equally to both sexes, shall exist within the United States or any place subject to their jurisdiction.

As the Nineteenth was modeled on the Fifteenth, so this proposed amendment is modeled on the Thirteenth amendment.

The sweeping character of the provision has created alarm among the friends of women workers who are justly apprehensive that the adoption of the amendment would wipe out laws concerning hours of labor, underground labor, minimum wage laws and all other kinds of protective social legislation for women with the exception of laws safeguarding maternity. There are feminists masculine enough to be prepared to surrender privileges as the price of getting rid of disabilities, but they are probably in a minority, and the chances are that the peril to social legislation on behalf of women will be removed by appropriate qualifications. So the Wisconsin Women's Rights Act of 1921 (Ch. 529) guards against a construction which will "deny to females the special protection and privileges which they now enjoy for the general welfare."

But apart from this untoward result, the critical lawyer will discover in the proposed amendment difficulties that are not so easily disposed of. Let one illustration suffice. At common law the surviving wife receives only a third or a half of the intestate husband's personal property, the surviving husband receives the whole of the wife's personal estate. The widow has a dower right in one-third of the husband's real estate, the husband a right of curtesy in the entire real estate of the wife, but only if there is issue. The proposed amendment forbids inequality; but how is equalization to be produced? by making the more beneficial provision applicable to both husband and wife? then which is the more beneficial: dower which is one-third irrespective of issue, or curtesy which is the whole but dependent on issue? The difference between dower and curtesy still exists in a number of states; and in these states the courts will be compelled to say that in this particular respect the constitutional amendment is inoperative until aided by legislation.

Could a more adequate formula be devised? I doubt it. The constitution is not a fit instrument to reform complex civil relations. It can proclaim a principle of equality, but it ought to leave it to the legislature to work it out.

Power of Governor to Pardon in Cases of Contempt

Important Question Presented by Controversy Between Court and Governor in Wisconsin—Pertinent Decisions

AN interesting controversy has arisen in Wisconsin between the Governor and the Courts which raises the question of the Governor's power to pardon persons in prison for contempt of court. The facts in the case are as follows:

> There was at Rhinelander a strike against the Rhinelander Paper Company. Peter Christ never was an employe, but was active on behalf of the strikers. So long as the strike was peaceable it was legal. However, the places of the strikers were filled by the company and the strikers, instigated by Christ, were both threatening and insulting to peaceful employes going to and returning from work.
>
> In this situation an injunction was issued against Peter Christ and many others merely enjoining them from unlawfully interfering with peaceful laborers while going to and returning from their work at the paper mills. Peter Christ wilfully violated this injunction and assembled a large crowd at Rhinelander, took the order of the Court, which was served upon him, and in their presence tore it into pieces and informed them that that showed how much attention he paid to the Court order. He was brought before the Court charged with contempt of Court. He admitted violation of the injunction and for his flagrant contempt of court was sentenced to four months in jail. A short time before the sentence expired, on application therefor, the governor issued a pardon of Christ and directed the sheriff to discharge him.
>
> In issuing the pardon the governor stated: "To continue this man in prison after the strike, out of which the contempt proceedings grew, has long been settled, will only give force to the fast growing public opinion that the law is an instrument against the weak and in favor of the strong."
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> As a matter of fact the instigators of this strike insist that it is still in force!
>
> It is the opinion of Judge Reid that the governor had no jurisdiction to pardon for this contempt and that the simple way to test the question was for Peter Christ to bring habeas corpus proceedings against the sheriff for his release. But, instead of favoring this the

governor threatened the sheriff with romoval from office if he obeyed the court and not the governor.

On this appearing to be the situation Judge Reid wrote to Governor Blaine the following letter:

"Merrill, Wis.,
October 23, 1921.

"Honorable John J. Blaine,
"Madison, Wis.
"My Dear Governor:

"In relation to the pardon of Peter Christ I suggest that the question involved is one of grave importance to the courts and the executive power of this state, and that the question ought to be resolved by the Supreme Court in the most direct and simple way. This can be done by Mr. Christ's instituting proceedings to obtain a writ of habeas corpus. Since this question involves the power of two distinct departments of the government, I am inclined to think that the Supreme Court would take original jurisdiction and dispose of the case promptly. I very much want the Supreme Court to pass on the question, and I know that other circuit judges feel the same. If I am wrong in the position I take I want to know it and I assume you feel likewise if you are wrong. The case can not be disposed of by newspaper notoriety.

"It is, of course, unfair to the sheriff of Oneida county, who is endeavoring to do his duty to the best of his ability, to suggest that he might be removed from office. This is merely setting a back fire.

"Very truly yours,
"A. H. REID.

In the reply of the governor to this letter he charged Judge Reid with intermeddling through arbitrary judicial power with the duties of the sheriff and with refusing to proceed according to law.

The Marathon County Bar Association at a meeting held November 2, 1921, went over the whole controversy and adopted, with but two dissenting votes, the following report and conclusions of its committee which had been appointed to give careful consideration to the question involved:

These facts require no discussion. They demonstrate that the situation which they portray imperatively demanded the proceedings instituted against Peter Christ for his flagrant and insulting defiance of the lawful and necessary order of the court, issued to prevent further acts of contempt of the authority of the court and of the law that the court was enforcing; and also to prevent the condition of lawlessness and violence that would inevitably follow if such contempt were not rebuked and restrained; and the sentence of imprisonment that the court imposed upon the offender, who admitted his offense, was richly deserved. As it was imposed for contempt of court, and not for inciting nor participating in the strike it is manifest that the alleged termination of the strike, before the expiration of the term of imprisonment, could present no logical reason for shortening the term of punishment for that contempt.

It follows, therefore, that the governor's pardon in the premises could subserve no just nor useful purpose, but was mischievous and manifestly calculated to undermine and impair the authority of the courts and that respect for their just decisions which is essential to the preservation of law and order.

The reasons given by the governor for this pardon emphasize these conclusions:

The first, that the imprisonment should cease a few days before the conclusion of its term because, as alleged by the governor, the strike had "long been settled" is inconclusive and puerile.

The second, that the serving of the few remaining days of this term of imprisonment would, in the circumstances, "only give force to the fast growing public opinion that the law is an instrument against the weak and in favor of the strong," is wholly unfounded and indefensible. We know of no such opinion of the law or its enforcement by our courts that obtains amongst intelligent, law-abiding citizens—and this ill-advised and unwarranted public statement coming from the governor of this state, himself a lawyer and hence an officer of the courts, merits the severest condemnation.

As for the charge made by the governor against Judge Reid of "intermeddling through arbitrary judicial power with the duties of a sheriff and refusing to proceed according to law,"—it is not only grossly discourteous and unworthy of the governor's high office but will be challenged and denounced by all who, like ourselves, have the privilege of acquaintance with Judge Reid and who therefore respect and admire him for his high character and ability and his conscientious fidelity to his duty as a judge and to righteous enforcement of the law.

The legal phase of this controversy is an interesting one. It seems to have been definitely decided in Campion vs. Gillen (79 Neb. 364; 112 NW 585; 126 ASR 667) that the language of the Constitution giving to the Governor power to pardon for "offenses" applies to criminal offenses only.

The Wisconsin Statutes contain two separate chapters on the subject of contempt of court, one being chapter 117 dealing with criminal contempt, and limiting the term of imprisonment thereunder to thirty days; the other (chapter 150), dealing with civil contempt, prescribing the procedure, and limiting the term of imprisonment to six months. It is understood that the procedure against Peter Christ was under the civil contempt chapter, and that must have been the case, for the term of imprisonment was four months, which is about three months more than that permitted under the criminal contempt law.

If the case under consideration should ever reach the highest court of the state, the decision in Vilter Manufacturing Company vs. Humphrey (132 Wis. 587), would, no doubt, have an important bearing on its determination. It was there held that where disobedience of an injunctional order by a party to the action is both a civil and a criminal contempt, if the proceeding to punish it is entitled as the action in which the order was made and charges injury to the rights or remedies of the opposing party by reason of the violation, such proceeding is a civil proceeding.

If it is true that the language of the constitution applies only to criminal cases, and that the procedure here was under the statutes relating to civil contempt, the decision in the Vilter case would seem to negative the power of the Governor to pardon here. See also 127 Wis. 215.

An interesting article dealing with the conflict between the executive and judicial departments in cases involving the right of the Governor to pardon in cases of contempt will be found in Vol. 12, Law Notes, 184.

Unified Courts

The soul of judicial reform lies in reorganization of the judiciary to permit of the responsible direction of judges and lesser judicial officers. This is what is implied in the phrase "unified courts." The Louisiana constitutional convention refused to take the long step ahead. The Illinois convention has gone considerable distance in recognizing the need for expert administration of the many judges in its metropolitan center. The New York convention is now being urged to unify the courts of the state and provide adequate administrative power. No other proposal promising important results has been offered and none can be offered. The Missouri State Bar Association is preparing to present a thoroughly unified system to the convention soon to be held. The first draft of the judiciary committee of the Association is complete in its acceptance of the principles involved. And now looms up the plan for imposing on the federal judicial system the essential principles of this needed reform. It looks very much as though the unified court plan would before long be given opportunity to prove its worth.—*Ohio Law Bulletin and Reporter.*

AMERICAN BAR ASSOCIATION JOVRNAL

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THE PRESIDENT'S MESSAGE

In his recent message to Congress, President Harding said:

> Just as we are earnestly seeking for procedures whereby to adjust and settle political differences between nations without resort to war, so we may well look about for means to settle the differences between organized capital and organized labor without resort to those forms of warfare which we recognize under the names of strikes, lockouts, boycotts and the like. . . . With rights, privileges, immunities and modes of organization thus carefully defined it should be possible to set up judicial or quasi judicial tribunals for the consideration and determination of all disputes which menace the public welfare.

This part of the President's message has provoked commendation and criticism; commendation from those who are necessarily in the position of disinterested spectators and hence in a recognized place of danger from such warfare, and criticism from the extremists of both parties combatant.

What is the basis for the unwillingness of the parties to these labor controversies to permit the intervention of some impartial judicial tribunal to decide the controversies according to the right and justice of the case? Do each of the parties desire something more than right and justice? It is more charitable to say neither party believes that his dispute can reach a just decision by judicial determination, but he who says this is on untenable ground. Are the questions of wages and the hours and conditions of labor more difficult than the questions of railroad and public utility rates, are they more vital than those of legitimacy, inheritance, guilt, innocence, liberty and life? And if the parties themselves have been able to form sound judgments as to the justice of their claims, cannot others, as able and experienced as they and possessed of the great advantage of disinterestedness, arrive at a more accurate measure of justice? The lawyer finds it hard to believe that these questions are not susceptible of judicial determination according to fundamental principles of justice.

Is not the whole trouble due to the fact that there has not yet been devised the particular type of tribunal which is appropriate to the determination of such controversies? Arbitration has been tried and found unsatisfactory, but arbitration where each of the opposing sides selects one and the two a third, is not a judicial procedure—it is a negotiation by advocates and partisans. It should be frankly admitted that the present tribunals are not appropriately constituted for the determination of these controversies, but that circumstance in itself is not an argument against the "substitution of the rule of justice for the rule of force" in labor controversies. Rather should it stimulate the effort to devise a form of judicial tribunal which would be able to accomplish that greatly desired end.

LEGAL EDUCATION

The Journal has given a large proportion of its space in recent issues to the subject of educational requirements for admission to the bar. The action of the American Bar Association at its Cincinnati meeting, the Carnegie bulletin No. 13 and the discussion which that notable publication has provoked, have made this one of the questions of the day for the profession. A great conference on the subject will be held in Washington from which great results ought to be expected.

Those who prate of democracy in the profession, who plead for easy admission to its ranks are, whether they realize it or not, thinking of the right of the individual aspirant, and forgetting the function and duty of the lawyer.

Our civilization rests upon the judicial institution. "Justice is the greatest concern of man upon earth." But Judges alone cannot administer justice. It is only when the controversy has been fully presented and the law diligently studied and logically applied to the facts, that justice can be assured. The lawyer therefore is an indispensable agency for the procurement of justice, and the quality of justice will be directly related to the quality of the lawyer. No one should be permitted to exercise these great functions and assume these great responsibilities without adequate mental equipment and training.

When these important and many-sided questions are debated and an agreement is reached as to the educational prerequisites for admission to the bar, there will arise the im-

portant consideration of the means by which the judgment of the profession may best be put into practical effect.

Any plan which contemplates the enactment of laws by state legislative bodies, increasing the requirements for admission to the bar, will utterly fail to establish any uniform or consistent rule. The forum to which resort should be had is the judicial not the legislative branch of government and the attempt should be to procure from the Supreme Courts of the several states, rules of court prescribing the desired educational qualifications for admission to practice.

THE WASHINGTON CONFERENCE

The international conference on the limitation of armaments is outgrowing its name. The initial dramatic gesture has proved to be but a beginning. A treaty has already been signed by the representatives of four great powers concerning the islands of the Pacific. Wise counsels are beginning to find a common basis of agreement concerning China. No one can doubt that sincere effort is being made to compose differences and remove misunderstandings which threaten the continuance of friendly relations between the four signatory powers, and that substantial progress has been made towards the success of that effort.

One who appreciates the historical truth that disarmament, whether of individuals or nations, naturally *follows* the settlement of controversies and does not usually *precede* it, will observe that Japan did not formally agree to the 5-5-3 naval formula until the four power treaty had been signed.

The limitation of armaments alone will be an economic boon. It will lighten the intolerable burden of taxation on a world in financial distress. The removal of the potential causes of war, however, will automatically bring about a further voluntary decrease of naval and military expenditure, and is the only certain method of establishing lasting peace.

How are the causes of war to be removed? First, they must be ascertained and understood; second, they may be removed by friendly discussion, patiently continued until differences are harmonized through mutual concessions founded upon justice to all concerned; and lastly, controversies which the parties themselves cannot settle, may be submitted to arbitration or judicial determination. There has never been any other formula for peace—individual, social or national. The Washington conference is making marvelous progress in the use of the first and second divisions of this formula, but what will be the situation if there remain at the end of this conference controverted questions which have not been settled by the amicable agreement of the interested parties? Does not the experience of mankind answer that the only hope of peace lies in the third division?

We have not yet reached a common consent of mankind as to what controversies between nations should be submitted to judicial determination and what are non-justiciable. It may take time to accomplish this result, but it seems inconceivable that the mind of man, which has devised an efficient system for the abolition of private warfare, should be incapable of devising a similar system for the preservation of peace between nations.

There are grave difficulties in the way of the accomplishment of such a program, not the least of which are selfishness and ignorance, but these same obstacles stood in the way of the establishment of the judicial institution as a means of preventing private warfare.

The establishment of world justice is a greater task than the establishment of private justice, but it is worthy of the best efforts of humanity and there is no better time for a supreme effort than today.

THE PASSING YEAR

This year has been one of hardship, but there are signs of progress and of hope. The processes of post-war liquidation are pretty thoroughly completed and the minds of our people are in proper attitude for a renewal of business activity. We have learned that the rehabilitation of European finances and foreign credits is essential before we can expect to see our enterprises move forward at full speed. May we not, therefore, hope that better understanding of the causes of the commercial paralysis will ensure the removal of those causes?

The world is manifesting a real desire for peace. Will it not soon manifest a like desire for mutually helpful cooperation?

The lawyer has shared in the hardships of his clients. The widespread financial depression and the general feeling of insecurity have greatly lessened the number of new enterprises which would have required his advice and guidance. He will share in the benefits of the renewal of business which is sure to come as soon as a better understanding of our relations to the rest of the world prevails.

The JOURNAL wishes its readers a Merry Christmas and a Happy New Year.

JAMES KENT

Picture of Man as Lawyer, Judge and Author Presented by Series of Documents and Letters in His Own Hand-Writing and Hitherto Unpublished*

By Hampton L. Carson
Of the Philadelphia, Pennsylvania, Bar

IN talking to you tonight about James Kent, I shall not attempt to add to the many excellent monographs and eulogies with which you are familiar. Such an adventurous thought, if ever entertained, would be effectually discouraged by the recent appearance of the admirable sketch given by Professor Hicks in his "Men and Books Famous in the Law," based, as it is, upon the unrivalled material in the possession of the Columbia Law School and the diaries and other Kent papers in the Manuscripts Division of the Library of Congress. I shall rely mainly upon material in my own possession collected during the past ten or fifteen years—documents and letters in Kent's own handwriting which have never been published, but which, when collated with those already known and arranged in chronological sequence, present a simple but pleasing picture of the man as lawyer, judge and author.

The name of James Kent will always command the respect of the legal profession as well as of that portion of the community which cherishes the ideal of lofty judicial reputation as one of the safeguards of civil liberty. In point of eminence and useful service, he will rank with Coke, Hale, Holt, Hardwicke, Mansfield, and Eldon of England, and with Lemuel Shaw, William Tilghman, John Bannister Gibson, John Marshall, Joseph Story and Henry Alexander Desaussure in America. In fact, if twelve possible lists, each containing twelve names, were made up of the greatest judges of the Anglo-Saxon race, it is probable that the name of Kent would occur in all of them. This preference would be due not alone to natural ability and extraordinary learning, in which he was equalled by many men not named, but chiefly because his faculties were energetically employed, at a critical and formative stage, in building up our institutions, and after his enforced retirement from the bench through an unwise provision of the law as to age, he continued to exert his unexhausted powers in the comprehensive arrangement and discussion of all branches of our jurisprudence, except the law of crimes. He was to legal literature in America what Blackstone was in England, and prior to this he had played a judicial role such as Blackstone had never filled, or could have hoped to fill. The student of American Society—whether lawyer or layman—cannot afford to ignore either the importance or the extent of the work accomplished by Kent, both as a judge and commentator. He created scientific equity jurisprudence so far as New York was concerned, just as Tilghman did in Pennsylvania and Desaussure in South Carolina. His judgments were closely studied and followed as precedents in other States by jurists who were themselves seeking light, and when to these labors—too soon interrupted—he added those of a painstaking analyst of the sources of our jurisprudence in all its branches, exploring with care and stating results with admirable discrimination and marvelous precision, he crowned a long career of active public service by presenting in concrete form the result of many hundreds of years of judicial labors both in England and here, making of his work a true repository of legal learning, attractive in form, and lucid in expression.

Dean Stone has written of him "as in many respects the most gifted and attractive figure in the annals of American Jurisprudence," as a man of "liberal and enlightened spirit," and again as a commentator of "mellifluous passages." Kent himself, unable, of course, to see himself as "ithers" now see him, took a much more modest view of his achievements. In a letter, written in his sixty-sixth year, under date of October 6th, 1828,[1] he says: "My attainments are of too ordinary a character and far too limited to provoke curiosity. I had nothing more to aid me in all my life than plain method, prudence, temperance, and steady persevering diligence. My diligence was more remarkable for being steady and uniform than for the degree of it, which was never excessive, so as to impair my health or eyes, or prevent all kinds of innocent or lively recreation." Which of these two judgments is the more just, you yourselves can determine at the end of this discourse.

Kent was born in Dutchess, now Putnam, County, N. Y., on the 31st of July, 1763, thirteen years before the Declaration of Independence, and died, at the age of eighty-four in the City of New York, December 12th, 1847, almost within touching distance of our Civil War. His boyish days were "nourished" among the Highlands East of the Hudson, and hence, he enthusiastically declared: "I have always loved rural and wild scenery, and the sight of mountains, hills, woods and streams always enchanted me and does still. This is owing in part to early association, and it is one secret of my uniform health and cheerfulness."

He was educated at Yale College and graduated in 1781, standing as well as any of his class, "but," he adds, "the test of scholarship in that day was contemptible." His classical studies were meagre and he had never looked into any Greek book but the New Testament. "My favorite studies were Geography, History, Poetry, Belles Lettres, etc. When the College was broken up and dispersed in July, 1779, by the British, I retired to a country village, and finding Blackstone's Commentaries, I read the four volumes. Parts of the work struck my taste, and the work inspired me at the age of sixteen with awe, and I fondly determined to be a lawyer." He was placed by his father, who was half farmer, half lawyer, with Egbert Benson at Poughkeepsie, then the Attorney General of New York, and later a puisne judge of the Supreme Court of Judicature, and still later one of the United States Circuit Court Judges displaced by Jefferson in

*Address recently delivered before the Association of the Bar of the City of New York.

1. First published in the Southern Law Review, Vol. I, p. 312, and addressed to Thomas Washington, Esq., of the Bar of Tennessee.

1801. In Benson 's office he laid the broad and deep foundations of his subsequent knowledge of jurisprudence. In spite of a natural volubility of utterance which often caused him to somersault vocally, he was a "modest, steady, industrious student," reading Grotius and Puffendorf in large folios and making copious notes. He read also Smollett's History of England and Rapin's History in folio, making a manuscript abridgment of the parts relating to the laws and customs of the Anglo-Saxons. He abridged Hale's History of the Common Law, and the old books of practice, and read parts of Blackstone again and again. He also reduced into several manuscript volumes Mr. Hume's History of England, which he much admired for "profound reflections and admirable eloquence."

His gay and even roystering and gallant fellow students thought him very odd and dull in his tastes. He never danced or played cards, or sported with a gun or drank anything but water. In later life, I may remark in passing, though always temperate, he did not confine himself to water, but enjoyed a social glass. While in the office of Chancellor he was called upon by a Temperance Committee and urged to sanction a Mass Meeting and to sign a pledge of total abstinence. He replied: "Gentlemen, I refuse to sign any pledge. I never have been drunk, and, by the blessing of God, I never will get drunk, but I have a Constitutional privilege to get drunk, and that privilege I will not sign away."[2] Even at the present slight distance from the Eighteenth Amendment these words sound like the snort of a judicial Megatherium. He was always more or less choleric, sometimes on the bench, and even sometimes on the street, for one day chancing to see Aaron Burr, after his return to the bar following his miserable exile, on the opposite side of Nassau Street, "the little judge" as Hamilton had once affectionately termed him, darted across the highway and shaking his cane in Burr's face, exclaimed with passion, "You are a scoundrel, Sir!—a scoundrel." Burr flushed, but, controlling himself, raised his hat in a sweeping bow, and replied, "The opinions of the learned Chancellor are always entitled to the highest consideration."[3]

But I must not digress. Kent himself tells us: "I was admitted to the Bar of the Supreme Court in January, 1785, at the age of twenty-one, and then married, without one cent of property; for my education exhausted all my kind father's resources and left me in debt four hundred dollars, which took me two or three years to discharge." His wife, the daughter of a farmer, was but sixteen years of age, and "that charming and lovely girl," as he called her, was "the idol and solace" of his life, and survived him by several years. In April of 1785 he entered into partnership with Gilbert Livingston for twelve years, with liberty to remove from Dutchess County after six years. Finding the relationship irksome and burdensome, notwithstanding a "great and established run of business," after a brief service in the Assembly as an active Anti-Clintonian and his defeat as a candidate for Congress by his brother-in-law, Theodorus Bailey, he removed to New York in April 1793, burdened with a totally disabled father, a dying daughter, a small but well chosen library, scanty furniture and £100 in cash, and leaving real property in Poughkeepsie to the value of £200, the total result of his eight years at the Bar. His average annual earnings had not exceeded $500. But neither poverty nor prudence could restrain his passion for books. One day, when the family exchequer was at its lowest ebb, Mrs. Kent was horrified at the arrival of a wheelbarrow full of the works of DeThou, the French jurist, accompanied by a bill for forty dollars. The harried Kent rushed into the street, and meeting the afterwards celebrated Edward Livingston, who was then a Trustee of the Society Library, exclaimed: "Livingston, are you aware that you have not in the Library the works of the great DeThou? I can obtain a copy and will see that they are sent." The offer was accepted, and the future Chancellor breathed freely over his ingenious escape from debt. It was envy of Livington's familiarity with Horace and his ease of quotation, few words of which Kent then understood, that induced Kent, "in shame and mortification" as he tells us, to revive his classical studies, in which he became such a proficient as to master and retain in after life a professorial knowledge of Horace, Virgil, Livy, Tacitus, Cicero and Sallust, as well as of the Iliad, the Odessy, Demosthenes and Hesiod. "I must observe," he once wrote, "that the sublimity and pathos of the fierce and barbarous scenes of the Iliad were so powerful and impressive as to render the reading of Homer a rich compensation for all my pains."

He did not neglect his reading of law books. Shortly after his arrival in New York, such was his reputation for legal knowledge, that in December, 1793, upon the establishment of a Professorship of Law in Columbia College at a salary of £200 per annum, he was chosen to fill the chair, owing his selection to the influence of Dr. Bard, Judge Hobart, the Livingstons and Chief Justice Jay. During his first year he read twenty-six lectures, which he subsequently discovered to be but "slight and trashy" productions, to seven students and thirty-six gentlemen. The next year he read thirty-one lectures in his office to but two students and his clerks. The next year, no students offered to attend, and thoroughly disgusted, after another effort when he mustered but a class of eight, he resigned in 1798 and longed for the solace of a Sabine farm. His efforts at the Bar, however, had begun to bear fruit, and we find him being consulted in difficult matters by his brothers at the Bar.

I have now sketched in outline, very imperfectly I am aware, a background for the introduction of my exhibits. We see him as a small man physically, of hasty temper and vehement speech, sanguine in temperament, of excellent health and cheerful optimism subject only to occasional sinking spells, of a marvelously retentive and reproductive memory stored with knowledge unusual in those days for its depth, breadth and accuracy, with the firm friendship of leading Federalists such as Hamilton and Jay.

I now exhibit an original letter, dated June 2nd, 1794, addressed to S. M. Hopkins, Esq., a brother member of the Bar. The firmness of its tone, authoritative without superfluous argument, indicates the solidity and certainty of his knowledge. It contains a concise exposition of the basis of judicial independence. He writes:

"The judgment which you are employed to support appears to me to be erroneous. No judge is responsible by action or Indictment for mistakes in the Execution of his Office. This immunity as far as it respects the Judge of the Sup. & County Courts is absolute and universal, but as far as it relates to

2. Memoirs of Chancellor Kent by his Great Grandson, William Kent, p. 165.
3. Ibid: p. 36.

Inferior Judges whose cognizance of matters is limited, it applies only while they are acting within their jurisdiction. Were it otherwise 'He would expose the justice of the Nation (to use the words of Lord Holt) and no man would execute the office on peril of being arraigned by action or indictment for every Judg't. he pronounces. If a Justice record that as a force which is no force he cannot be drawn in question 12. Co. 23. & where a Jury presented a fact as Trespass & a Judge of the Assize caused their finding to be ent'd. as a felony, yet he could not be punished by Indictment or otherwise'—1. Salk. 397. & see Comy. Rep. 81. & 1. L— Raym. 454. S. C. with numerous authorities to the same point in the Margins. I don't see how you will avoid the application of these Principles to the case you state. The Justice was certainly in the exercise of his office, & with a case within his Jurisdiction when he committed (by way of nonfeasance) the Injustice alleged. It appears to me besides to be a thing most unfit & improper that one Magistrate should be suable for such acts before another Magistrate perhaps equally fallible & partial, & to open a wide door to public Inconvenience & Vexation. By our System a Competition among Justices arises for Business, & no doubt one Justice feels interested in crushing another, because his Custom is hereby enlarged."

He then discusses with a familiarity lost to our day, the mysteries of special pleading:

"I think the 2d Count bad, & the Verdict being general, the Judg't. is bad also. You say no *Conversion* is laid, & that is certainly matter of substance, & I think not cured by Verdict. The authorities are full on this Point, that a Conversion must be laid & proved. If the Count be considered in *Detinue* & not Trover then you fail for it is joined with another special Count sounding altogether in *Tort,* & besides the Chattel detained is not described well enough probably for Detinue, & the Verdict is bad, for it ought to have been for the Value of the thing & nothing else will do.

"I inclose to you the formal Parts of a Return to a Certiorari. An attachment I believe never issues til a Rule to show cause. It must be a singular case in which the Court would grant it in the first instance.

"In looking over my Papers I find I have a copy of a Return, at length, which is of no use to me, & so I send you that as containing the whole matter.

"You will not fail to command my advice & assistance as far as they may be of service, whenever you want them.

"Believe me to be most
"Sincerely your Friend,
James Kent."

"S. M. Hopkins, Esq."

In February, 1796, he was appointed by Governor Jay, without solicitation and much to his surprise, to a Mastership in Chancery, there being but one other Master in New York. There were sixteen disappointed applicants. The office proved to be profitable. "This office," wrote Kent, "promised me a more steady supply of pecuniary aid (of which I stood in need) and it enabled me in a degree to relinquish the practice of an Attorney, which I always extremely hated. My diffidence, or perhaps pride, was the principal cause of this disgust, since I found that I had not the requisite talents for a popular and shining advocate at the Bar." My second exhibit illustrates this period. It is a Master's Report, simply fixing the amount of principal and interest due upon a Bond. It has high color, however, because the defendants were Robert Morris and Alexander Hamilton. It appears that Morris had given a bond and mortgage to Hamilton in the principal sum of $81,679.44/100, and an assignment had been made by Hamilton to the complainant. No interest had ever been paid, and at the date of the report the arrears amounted to $11,436.12/100, making a total debt of $93,115.50/100. The paper is sad evidence of the burden of debt that Hamilton was carrying, and of the fact that he had been swept into the maelstrom of Morris' land speculations.

The Report reads as follows:

STATE OF NEW YORK
IN CHANCERY
JOHN PARKER CHURCH
VS.
ROBERT MORRIS &
ALEXANDER HAMILTON
} REPORT

TO THE HONORABLE THE COURT OF CHANCERY—

In pursuance of an Order of this Court that it be referred to one of the Masters of the same to report the Amount of the Principal & Interest on the Bond & Mortgage given by the Defendant Robert Morris to the said Alexander Hamilton & by him assigned to the said Complainant up to the Time of making the said report, I, James Kent, one of the said Masters, Do report that the amount of the Principal due on the said Bond is eighty one thousand six hundred and seventy nine Dollars and forty four Cents, & that the Amount of the Interest due on the said from the first day of January one thousand seven hundred & ninety six—the Time of the commencement of Interest on the said Bond and Mortgage up to the Date of this Report is Eleven thousand four hundred and thirty six Dollars and twelve Cents & that the Principal & Interest together amount to ninety three thousand one hundred & fifteen Dollars and fifty six Cents.

All of which is respectfully submitted by—

James Kent
Master in Chancery.

New York January
1st, 1798.

During the next two years Kent's public honors multiplied. While serving as Master in Chancery he was appointed by Governor Jay Recorder of the City of New York, and was qualified to hold the office by being admitted as a freeman of the City of which at that time there were but twelve hundred and nine in a population of thirty thousand. At the same time he was appointed Attorney and Counsel to the Corporation, and for a second time was chosen to the Assembly. None of these offices were deemed to be incompatible, although the matter was strenuously discussed in the Governor's Council. While in the Assembly he participated in the election of a United States Senator, voting against Aaron Burr. The dark days had now passed. He wrote: "I found myself at this era advanced to an easy and independent support, to public estimation, and to complete and joyful emancipation from all pecuniary engagement." With characteristic enthusiasm he adds: "I pursued my studies with increased appetite and enlarged my law library very much." He even ventured so far as to purchase a slave wench.

He was not long to remain a pluralist for in February, 1798, he was appointed Judge of the Supreme Court, which had been the grand object of his ambition for several years. My third exhibit relates to this appointment, and incidentally throws light upon Mr. Hamilton's characteristics as a practitioner. The let-

ter is dated February 26, 1798, and is addressed to his client, Dr. Morse.

" . . . I have received since I wrote to you last the appointment of a Judge of the Sup. Court. This puts a total stop to my agency in Business. I shall also by the 20th of April remove into the Country. You will be so good therefore as to address yourself hereafter on the Business of the Suit to Col. Hamilton my associate to the Cause, and lest his attention to the more formal Parts of the Suit should not be close enough, I intend to leave the superintendance of your Suit as well as other Business of mine remaining unfinished to *Jacob Radcliffe, Esq.* of this City a Lawyer of Probity, diligence & good sense. If any argument shall become necessary in April I presume Mr. Hamilton will be the Person & the proper Person to conduct it."

He then refers to the failure to expel from Congress Matthew Lyon of Vermont for spitting in the face of Rufus Griswold of Connecticut, as well as to our relations to France, and highly commends President Adams. He writes:

"You as well as myself must have regretted the humiliating conduct of the House of Representatives of the U. States in the matter of Lyon; & their want of unanimity, decision & firmness in respect to our relation abroad. The Trade of the Country is constantly harrassed & our rights & character abused by the French Government (a Government the most profligate & despotic on Earth) & yet very little seems to be indicated on our part towards Spirit, redress or Defence. The President has shown himself a vigilant & intrepid Guardian & acted as far as his Department authorized him, with resolution & with Promptitude. I hope the menacing cloud may soon disperse & give our Country returning Light & Serenity.

"Yours with much
Respect
James Kent."

"Doctor Morse."

My next exhibit discloses some of the difficulties of attending Circuit.

"Albany, July 8th, 1806.

"Dear Sir—

"I returned last Evening only from the Northern Circuit which has kept me from home almost ever since May Term. Your two Letters of the 23d ult. & of the 4th inst. were received & perused by me this Morning. There are some reasons why Mrs. K. & myself would wish to dispense with the Niagara Tour this Season. Her Father has been at the Point of Death for these six weeks, & if I were to go I should be obliged to hold an Oyer & Terminer at Oswegatchie which would be extremely inconvenient. If Mrs. H. & yourself can therefore make arrangements independent of us, we shall be accommodated. If Providence had rendered things so that we could have gone together I have no doubt we should have found it a very pleasant Expedition. But as I shall now postpone it for this year, I wish you & Mrs. Hopkins every success, & if you will call on us on your way, I can give you an useful Itinerary so far as regards Stages and Inns.

"Give Mrs. Kent's and my respects to Mrs. Hopkins & believe me Sincerely
Your Friend
James Kent."

At the time of Kent's appointment as a puisne justice of the Supreme Court, he was but thirty-five years old, and the youngest member of the bench. The Chief Justice at that time was Robert Yates who retired within a few months under the age limit of sixty years, and was succeeded by John Lansing, Jr., who in turn was succeeded by Morgan Lewis. Kent does not seem to have entertained a high opinion of the attainments of his associates, for writing freely in after life he declared: "The judges of the Supreme Court were very illiterate as lawyers, and the addition of John Lansing was supposed to be a great improvement to the bench, merely because he appeared to have studied more the King's Bench Practice and was more diligent, exact and forward in attending to cases and enforcing rules of practice." At the end of six years of service as an associate, Kent was advanced to the office of Chief Justice in 1804, under the appointment of Morgan Lewis who had become Governor. After ten years of service Kent became Chancellor in 1814.

I shall reserve what I have to say concerning his judicial character and achievements in law and in equity until the close so as not to interrupt the presentation of my exhibits.

Here is a letter exhibiting his caution in making orders and in executing decrees:

"Dear Sir:

"In answer to your note this moment received, I have to observe that where an order is made upon a Husband to pay a monthly or other allowance to his Wife

"no Execution can issue until the default is ascertained to the Satisfaction of the Chancellor, & then a new peremptory order issued preparatory to an attachment. That is the course I have hitherto pursued, & if there be any other Practice it is unknown to me & has never been sanctioned. It would be obviously unjust to issue Execution, until the *default* had been passed on & duly *adjudged*. It would be condemning a Party unheard.

"The 4th Sect. of the Act to which you refer respecting Execution to enforce *decrees* only applies to *final* decrees at the conclusion of a cause, & then the authority to issue Execution is always mentioned in the decree 'as that Def't. pay such a sum in such a time or that Execution issue according to the cause of the Court.'

"The same observation applies to the other Point, respecting an order to pay Costs on Exceptions. They are enforced by rule & rule to show cause & by attachment.

"I am always happy to give you any information in my Power.

Yours sincerely
James Kent.
22d May 1818."

"J. V. N. Gates, Esq."

Here is a letter, illustrating the control which the Chancellor exercised over the important matter of divorce:

"Albany, December 21st 1818.

"Dear Sir:

"I have the pleasure to acknowledge your favor of the 16th inst.

"To your Questions I answer.

"1—The Power of granting Divorces is exclusively in the Chancellor.

"2—The Proceeding is by a Bill filed upon which a Process or Summons issued to notify the Def't. or Party accused to appear & answer. If the Def't. cannot be found, there must be 3 months' notice in a public Paper. If however the Def't. be duly summoned & appears & *denies* the charge of Adultery, there must

be a Trial in a Court of law under the direction of the Chancellor & this is of course quite public. If the charge be *confessed* or if no answer be given, still in either case an order is made for a Master in Chancery to receive & report the Proof of the Charge & then upon that Report or the Verdict of the Jury, the Decree is founded.

"3—The Evidence must be sufficient to satisfy the mind, & it may be practical or circumstantial.

"The Person on whose account you write, will have of course to employ some Gentleman who practices in Chancery who will conduct the Business, & who will give all further requisite information.

I am with
Great Respect & Esteem
Yours
James Kent."

"Rev. Doctor Rameyn."

I now present letters which illustrate his private occupations. The first is to his brother Moses, and is as follows:

"Friday, Dec. 2, 1814.

"Dear Brother:

"Agreeably to the request contained in your letter recd. yesterday I now enclose in two Packages besides this, all the Newspapers containing discussions in which the Chancellor is the Theme.

"I enclose a 2d No. of Jurisconsultus
a 2d No. of Amicus Curiae
a Piece signed Amicus Jurisconsultus
a Note in Answer by the Chancellor.

"I send also a Piece signed Las Casas which may amuse you.

"I will not sell any of my Stock at present & I enjoy myself in great domestic & official tranquility. My Fireside is delightful. Aunt Hughes is beloved by us all & nobody lives happier than we all do. I have just read the Eding. Review for April & I think the first article in it on the Restoration of the Bourbons is a grand & wonderful display of lofty and sound principle. There are other articles in it deeply interesting. The Article on the History of France in the Q. Review for April is very valuable. I am also reading Virgil & French Books. I have got fine Stores of Beef & Pork —my house is very warm & I can ride out the winter Storms with utmost safety & contentment. Tell Lovett I thank him for his Dialogue. It is witty & sarcastic & gave us wonderful Pleasure in reading it. It is sacred Truth robed in the Garbs of Fiction.

Yours affec'y.
James Kent."

The second letter is addressed to Professor Silliman of Yale, and illustrates the breadth of his sympathies.

"Albany, August 7, 1819.

"Dear Sir:—

"I am obliged to interrupt your Studies for a moment to thank you for the pleasure & Instruction you have given me in another work of yours which has lately been presented by you and to which I have become a Subscriber. I have read attentively such parts as were most interesting to me of the four numbers in first volume of your 'Journal of Science,' and you have communicated such charm and luster to the science of mineralogy and the other kindred branches that I have been led to regret my exclusive attention hitherto to the more dull and dry science of jurisprudence. If I were young in life I have no doubt I should enter with zeal into your favorite study, and endeavor to match some of your generous enthusiasm in the pursuit.

"The science you are engaged in offers new views of the wonders of creation, and affords new and striking traces of the wisdom and benevolence of the Deity. The parts of the volume that most pleased me were your review of Professor Cleveland's mineralogy,—of Cuvier's Theory of the Earth, on an anticipated visit to the North Pole, on the just and spirited vindication of Trumbull's painting, and the fine eulogy on the character of the Abbe Barry, etc. The journal of Mr. Cornelius on the features of the Southern States was very pleasing; in short, all the articles that I could well understand were read with great interest and satisfaction.

"Yale College is the foundation from whence the Science of Mineralogy is pervading the U. States & the great Valley of the Mississippi between the Allegany & the Rocky Mountains is virgin ground which will soon be overrun & explored by Pupils reared under your Instruction, & who will circulate your fame. Excuse me my dear Sir if public approbation can animate you in your Studies & cheer you in your efforts to exalt the physical sciences in your native country, I am determined to contribute my mite towards it, however humble my approbation may be.

"This is intended as a kind of personal & confidential expression of Esteem & good wishes from one who is always happy to Subscribe himself.

With the highest respect & Friendship,
Your Obed. Sch.
James Kent."

"Professor Silliman:"

My remaining exhibits were all written after he had retired from the Chancellorship, and illustrate his varied occupations during his enforced but most unwelcome leisure, if leisure it can be called which proved to be the most productive period of his life in a work of universal and lasting interest.

Here is a letter which shows that he was being consulted by non-resident counsel. His correspondent, Mr. Duponceau, was one of the leaders of the Philadelphia Bar, a jurist in the true sense, familiar with those brances of commercial and international law in which Kent so brightly shone, and an author of reputation whose books still survive.

"New York May 4th, 1826.

"Dear Sir:—

"I have the pleasure to acknowledge your favor of the 30th ult., & circumstances have unavoidably intervened to withdraw my attention from the Subject of it until now.

"I do not know of any Decision of our Courts declaring that the usual Condition of Settlement annexed to Grants of Land from the State, in a certain prescribed ratio, & within a given number of years, would not affect the Validity of the Title, though the condition be not performed, until office found. But I know that has been uniformly assumed to be the law, & that the Grant was not void, but *voidable only* by nonperformance of that *condition subsequent*. In my opinion there cannot be a question in the case. Such a defence was never raised in opposition to a Claim of Title unless by the Patentee, though ten thousand instances must have occurred of the Non Performance of the Condition. It is for the State, & *the State only*, to take advantage of a Breach of the Condition, & the State must proceed by Inquisition & due notice.

Yours Very Sincerely,
James Kent."

"Peter S. DuPonceau, Esq."

Here is a scrap which proves his exactness in paying his subscriptions—for books of course:

"Mr. Kent had left at his House the other Day the 2 Volumes of *Mr. Dunlap's History of the Arts of Design* for which he was a Subscriber. He did not see the messenger & he now incloses $5 which he was told was the Subscription Price. If it be more he will most cheerfully send the Balance & he begs leave to present to his Friend The Author his sincerest respect & Esteem."
"25th So.'Marbi Place."

Here is a letter declining, because of other engagements, to write a memoir of Chief Justice Marshall, and suggesting Mr. Justice Storey for the task. It is proper to remark that at the date of the letter, the Chief Justice was alive, although beginning to suffer from that affliction for which he was subsequently operated upon by Dr. Parrish of Philadelphia.

"New York, 28th Feb. 1832.

"Dear Sir:—

. . . "I regret to state that I shall not be able to furnish a memoir of the life of Ch. J. Marshall. I have not the Materials at my Command, & if I had, I am now exceedingly & exclusively engaged in a particular Business, & am busy in preparing to remove into the Country in April. I cannot assume the task of any new Composition, but I would respectfully suggest that Mr. Justice *Story* of the Supreme Court of the U. S. is the very Person who has the Materials, & the facility, & the undoubted Inclination to gratify your wishes, & he would do it with the Pen of a Master.

"I regret further to state that I possess no Portrait of myself, & the only ones that have been taken were for the gratification of some friends, who were pleased to set much more value on such Specimens of a very ordinary Head than I ever did. My ambition never ran in that channel.

"I return by the Bearer the English Specimens you sent me with my full sense of the obligation, & I have the Honor to be,

With great Respect,
Your most obed. Serv.
James Kent."

"Mr. James Heoving."

Here is a letter, three years later than the former exhibit, describing a visit to Chief Justice Marshall, who had met with an accident, and who did not live to attend the January term of the Supreme Court of the United States referred to in the letter. There are also some touches upon travel and politics which are piquant.

"New York, May 22d, 1835.

"Dear Sir:—

"From the date of this Letter you will perceive I am at Home, & I did not pass through Baltimore, & I owe you an Explanation. I intended to stop on my return & spend a day with you, but I rely very much on your excellent good sense & equally generous Heart to appreciate my reason for the alteration of my Plan.

"I left Baltimore on Wed. & dined with Commander C. at Washington & spent the next day in that City & paid my respects (with my daughter with me) to Jackson whom I had never before seen. Mr. Butler, the Atty. General gallanted us everywhere over the Capital & public offices. I then called, (after leaving my daughter at Earby's) on Van Buren, St. Charles St., & I dined superbly at Elias Kane's, a relation of mine, where I met V. P. & Sec. of War & of the Treasury, & Atty. General & Sir. Ch. & the Spanish resident.

"Next day we drove down to the Canal & landed 60 miles below, & were driven John like in a real Post Coach to Richmond. Next morning I sallied out & introduced myself to the *Ch. J.* I found him low & distressed. He said he had been overset in the Post Coach sometime before & injured his Spine. He said he was in great Pain & his appetite was greatly impaired. He struck me as greatly emaciated & that he could not live long. I told him that I had come to pay my Homage to him, & would not fatigue him, but call once more in the course of the day. I then sallied out & introduced myself to B. C. Leigh, & he carried me to see Hon. Wickham, Chapman, Johnson & McShanard. I was invited to dine with the Barbacue Club in The Environs in rustic Style. I did so & met the *elit* of the City & was highly gratified. My daughter & I called on the Ch. J. towards Evening & found him better. He had rode out that day & he had rallied in Spirits, & assured that he should be at Court at January Term, & insisted that I should come & visit the Judges. I thought that a very good sign.

"Now for my promised Explanation. I was obliged to go next morning in the Boat or tarry until Wednesday; as the object of my visit to see & spend my time with the Ch. J. had failed, I could not tarry. We went on Board on Sunday at Sunrise & at Sunrise on Monday we were within 25 miles of Baltimore. But on board there were Col. Johnson & his *five race horses, Mr. Circer's sons & their horses,* & a *Boat full of delegates to the Non-Committal Convention* from Virginia, Carolina, etc., & I found from conversation that most of them had already engaged Lodgings at Bacnom's, and considering the *races,* the Baltimore Convention, the probable difficulty, if not improbability of good quarters, & my utter abomination of the Convention & its Satellites, & thought it a very unfavorable time to call & spend a day at Baltimore, & my daughter & I concluded to keep on to Phila. We therefore passed into the other Boat at the mouth of the Harbor.

"Now my dear Sir, is not my Excuse plausible, & can you think hard of me? I thought I had better wait & see you next Winter. I wish to present my best respects to Mrs. Meredith & to Mr. & Mrs. G. G. Howland, & to assure you of the highest Esteem. Regards of

Yours truly,
James Kent."

"J. Meredith, Esq."

Here is a letter which may well serve as a model for gentlemen similarly embarrassed by invitations to act in uncongenial tasks.

"New York. June 2d, 1837.

"Dear Sir:

"I received yesterday your Letter of the 30th ult. containing an appointment of myself & two other Persons to examine & decide on the Compositions of the young Ladies of the Albany female Academy. The nomination is kind & honorable to me, but under circumstances I am obliged to decline the acceptance of the Trust. It is too perplexing to be obliged to run over a number of M.S.S. Compositions, & to award Preferences in concert with Gentlemen who reside apart from each other. I was associated in a Trust of this kind recently, & it was embarrassing, & we did not concur in opinion, & I made up my mind at the time never to assume that kind of duty again.

"If I resided in Albany I should show my regard for that very interesting Academy in a more decided

manner than I am now permitted to do. With my wishes for its Prosperity & Pride in its high Character.

I am, Very respectfully,
Sincerely Yours,
James Kent."

"Mr. A. Crittenton."

Here is a letter addressed to one of the most famous members of your High Court of Errors and Appeals at a time when, like the House of Lords, the Senate of New York exercised appellate judicial jurisdiction:

"N. Y. Union Square, Nov. 7, 1842.

"Dear Sir:

"I have just now finished the Perusal of the 26th Vol. of Wendell's Reports, confined to Decisions in the Court of Errors, and I have been very much struck with the ability & learning displayed in the Discussions & Decisions, & especially with your excellent Opinions replete with profound & accurate learning & accurate views of the law. Your liberal & indulgent remarks upon my judicial Decisions I noticed with grateful sensibility; & as I may not have an opportunity to meet you very soon, I have taken the liberty to express in this way my sense of your distinguished merits, & my sincere regret that you are now withdrawn from that Senatorial House, where you so much & so usefully contributed to enlighten & adorn our jurisprudence.

"I am, Dear Sir,
with great respect,
Your Obedient Servant,
James Kent."

"Hon. Gulian C. VerPlanck."

The following letter is purely personal, but is addressed to a former colleague of his upon the bench, with whom, in spite of early differences, he had become intimate—the Honorable Ambrose Spencer.

"New York, March 21, 1842.

"My dear Friend:—

"Since I wrote to you this last Winter I have joined the *Congregation* of the Rev. Mr. Pine's Episcopal Church which is in the 4th Avenue not far from my House & hired a Pew. My inducements were several (1) the Bleecher Street Presbyterian Church was near a mile off & too far for convenience to Mrs. Kent & me, & besides the Church is noticeably involved in debt & the Pew which I own there will be swept away in the pending Sale of the Church, & though the Church will be bought in by leading members of it for the Debt, & should have to re-purchase a Pew if I took any. (2) I have long had an unconquerable Distaste to the Presbyterian mode of Preaching. That of Dr. Phillips in the Wall Street Church & that of Dr. Mason in the Bleecher Street Church was constantly on dry, hard, metaphysical & scholastic Divinity, & which never did & never could suit my Taste. (3) My Hearing is quite impaired. It was considerably so before I left the Court of Chancery. I could not hear one fiftieth part of what was said in Prayer or in the Sermon, whereas in the Episcopal Church there is the excellent Liturgy & Litany which opens before me & I can join in their Prayers & Praises & that after all is true real worship. (4) My family are all gone over to the Episcopal Church & left my dear Wife & me quite alone in the old Church. My son & his wife go to Dr. Hanke's Church. My eldest daughter Mrs. Howe who lives with me & her Husband prefer also the Episcopal mode of worship, & my youngest Daughter is the Wife of the Rev. D. Stone of the Episcopal Church in S. Brooklyn, where they have built him a Stone Church equal to any in New York except the new Trinity which is rising up. All those Influences were not to be resisted.

"Since January I was for a month quite disabled owing to a costive state of the Bowels, owing probably to too much & too indiscriminate eating. I was afflicted with a dull, constant Pain which threatened constipation & inflammation. It lasted for a month & dreadfully annoyed me before I called on medical aid, & I was bled, (the first time in my life) blistered & scoured by cathartics. It reduced my strength & flesh rapidly & greatly, but I got well & am now as well as ever, only not yet quite so strong, & it has led me to be more vigilant & wary as to *what* & as to *how much* I eat. I was always temperate in drinking, though I am no Ultraist in any thing, & keep aloof from all associations of that nature, be they what they may. My Passion for reading Literature & law & Politics & every thing else that is instructive or amusing is unabated. I get hold of every law Report in the U. S. that I can & read it & make notes to be used in the 5th Ed't. of my Commentaries if ever I should issue one. I believe I told you I have a Country Cottage of about 7 or 8 acres of Ground belonging to it 20 Miles due west of me, & there my Son's small family (for he has but one Son) & mine live together during the Summer. I have my Ice House filled & the Gardner engaged & the whole establishment is delightful. I keep there (but not in Town) a Coach & Horse for family use.

"Excuse me for talking so much about myself. It is the inclination & Privilege of old age to dwell on such topics. The affairs of the world recede from the attention & gradually lose their hold on our Interest & feelings, & we are very apt to admire the past & condemn the present. However that may be, Politics do not now deeply interest me & I feel quite indifferent as to Elections. My beloved Wife who has *lived with me 57 years* is in excellent Health & Spirits & walks about Town daily & almost daily visits her Brooklyn Daughter who has two fine Boys. I have in the whole 4 grand children. It is most pleasant to chat with an old Friend & my respect, Esteem & attachment to you are solid & fervent. Very, very few of my old Friends & contemporaries are left. My Friend Sylvanus Miller has been this winter breaking down in Health & my Wife's companion, the widow of General Bailey is in wretched Health. Indeed one half of my old acquaintance seems to be as poor in Property as in Health. I have real reason to be thankful to Divine Providence for the guardian care & Blessings which have been thrown around me & my family.

"Adieu my dear Sir,
& believe me,
Affec. Yours,
JAMES KENT."

"Hon. Ambrose Spencer."

My two last exhibits relate to sales conducted by himself of sets of his Commentaries, and set forth the terms upon which the book-selling houses of Boston and Philadelphia could purchase copies.

"New York, September 13, 1843.

"Gentlemen:

"I returned to the City from my Country Residence last Evening & read your Letter of the 12th inst. requesting 20 Sets of my Commentaries. I never

received the order of Mr. Brown, which you mention or I should have promptly answered it.

"I am sorry to say I have no Commentaries of the 4th Ed't. remaining, except ten unbroken Sets & these I keep for personal convenience & usage. I have two or three times been obliged to make the same answer to applications, which I now give.

"I shall want to know when it is convenient on what Terms as to Price & as to Credit you can furnish me with Paper of as good quality *in all respects* as the Paper of the last Edition, *& a little longer,* for a new Edition say 2500 Sets. I think I shall be ready & willing to set about a new Ed't. by 1st November.

Yours respectf.

James Kent."

"Messrs. Little &Brown."

"New York, April 26, 1847.

"Messrs. T. & J. W. Johnson:

"Gentlemen:

"In pursuance of your order of the Date of the 21st inst. I send this morning on board the Canal Line directed to you, 2 Boxes of Kent's Commentaries containing 25 Sets. As you are silent as to Payment, I presume you take them on my usual 6 months' Credit, instead of Cash with the usual Discount.

25 Sets @ $10.....$250.00
2 Boxes 1.50

Amount.....$251.50 on six months' Credit.

"When the Boxes are received & found to be correct, you will please to forward me by Letter your note for the amount payable to my order in six months.

"Yours respectfully,

James Kent."

And now, Gentlemen of the Bar Association, I have gathered up and displayed to you my little sheaf of Kent Memorabilia. I am conscious that it is small, but I entered a field already garnered simply as a gleaner. Such as it is, it is redolent of his fame, and the finding of each spear gave me pleasure and incited me to further search. As one of the old Reporters of the days of James I. wrote of his collection of cases: "There is nothing of mine own herein save the string that binds it."

Will you permit me, in closing, to add a few words upon Kent as the Judge, and then upon Kent as the Commentator. Better fitted by nature for the bench than for the bar, as he himself well knew, he was unusually fortunate in his opportunities for self-instruction, self-discipline and self assertion. These deserve a moment's scrutiny. *First,* his student days fell within those tranquil years that followed the Revolution, years that, so far as he was concerned, furnished unlimited time for the slow but certain absorption of the books about him. They were spent in a town far up the Hudson. Even the difficulties of reaching his home in the wilderness aided him. Once, during a prolonged calm, he was eight days in going by sloop from New York to Poughkeepsie. In the cabin he found an old book of Reports, English of course, for of American then there were none. Lying on his back day after day he absorbed it line by line, and years afterwards when distinguished counsel were groping vainly for a case they dimly recalled, he was able to quote it to them from the bench almost verbatim. The books that he studied were largely in folio, tomes stately in size and impressive in text, commanding and holding attention through sheer inability to throw them lightly aside. In character, too, they were important. Grotius and Puffendorf enlarged his vision and gave him glimpses of the open sea of jurisprudence: Coke-Littleton supplied him with the flesh of the Common Law; Hale instructed him in analytical methods, and Blackstone, closely following Hale's arrangement, furnished a polished legal vocabulary. All these he read with pen in hand, and he made notes both copious and minute.

Secondly, there came the stimulus of example. Alexander Hamilton, his intimate and his idol, was but seven years his senior, and the admiring Kent devoured the papers of the Federalist and heard with eager ears every word of those impassioned speeches by which Hamilton secured the ratification of the Constitution of the United States by the New York Convention. Then, too, he listened to Richard Harrison and Abraham Van Vechten, who, as Mr. Binney has told us, stood like an old Dutch sea-wall against the irruption of false doctrines. It was these three, Hamilton, Harrison and Van Vechten, who first introduced principles into forensic discussions and poured light and learning upon the science of the law. So much for his basic training.

Thirdly, he came upon the bench unembarrassed by legal pedants as colleagues, or by crude reports of cases ill considered and imperfectly decided. He had a free hand in applying the broad principles of British justice to American conditions. Let me abridge the substance of his own account of what he found and of what he did. When he came to the Bench there were no reports or State precedents. Opinions were delivered *ore tenus.* Kent first introduced a thorough examination of the authorities and written opinions. *Ludlow* vs. *Dale,* 1st Johnson's cases, is an early example. When the judges met, they all assumed that foreign sentences of prize courts were only good *prima facie.* Kent presented and read a written opinion that they were conclusive. All surrendered to him. This was the commencement of a new plan. Between 1798 and 1804 Kent read Valin and Emerigon, and completely abridged the latter, making at the same time copious digests of all the English law reports and treatises as they appeared. He made much use of the *Corpus Juris,* and as the judges, Brockholst Livingston alone excepted, knew nothing of French or Civil law, he had an immense advantage over them. He would generally put his brethren to rout and carry his point by his mysterious wand of French and Civil law. As the judges were kindly disposed as Jeffersonians to everything that was French, Kent, following Lord Mansfield's use of such authorities, was enabled, without exciting alarm or jealousy, to make free use of the same material, and thereby enrich our Commercial law. He gradually acquired a preponderating influence, and Johnson's reports, after he became Chief Justice in 1804, show it. At first the practice was for each judge to write his fair share of opinions, when the Court agreed. This gradually fell off, and for the last three or four years of his service, he gave the most of them. Then came the *Per Curiam* habit, resorted to to conceal the fact that Kent had written every opinion. He states that for sixteen years he labored his opinions most unmercifully, because it was necessary to subdue opposition. English authority did not stand well, especially with Ambrose Spencer, a man of bold, dogmatic mind and overbearing manner. This led Kent a hundred times to attempt to bear down opposition or shame it by exhaustive research and

overwhelming authority. His mind was aroused and kept inflamed by collision. Thus was his primacy established. There can be no doubt of the value and purity of his labors in improving jurisprudence.

In 1814, he became Chancellor and had no colleagues to contend with. He took the Court as if it had been a new institution. He had nohing to guide him and was at liberty to assume all such English Chancery powers and jurisdiction as he thought proper. This gave him a grand scope checked only by the revision of the Senate, then acting as a Court of Errors. His practice was to make himself mathematically accurate in his mastery of the facts by abridging bills, answers and depositions. By that time he saw where justice lay, and his moral sense decided doubts. Then he sifted the authorities. While at times embarrassed by a technical rule, he generally found principles suited to his views of the case. His "object was so to discuss a point as never to be teased with it again, and to anticipate an angry and vexatious appeal to a popular tribunal by disappointed counsel." Such was he as Chancellor. I need not stop to discuss the merits of his work. His commanding authority, and the consolidated weight and strength of his office in establishing scientific Equity in America was immensely buttressed by the fact that his opinions as Chancellor were published and bound in exclusively Equity Reports and not mixed as they were in Pennsylvania, where no separate Chancery existed, with Common law matters. Kent's administration of Equity forms an epoch in the judicial history of New York, and the seven volumes of Johnson's Chancery Reports are classics of the profession. We view him today as a sturdy pioneer toiling in a new and stony field, but sunburnt by the light that shone from the decrees of Nottingham, Somers, Hardwicke and Eldon.

As a Commentator, Kent is invariably spoken of as the American Blackstone. This is to give him an exalted place, for the position of Blackstone is unique, and no one but Kent has ever shared those honors. But we must not stop here. This assignment of place is proper if the works of both be regarded from the standpoint of institutional text books for students, but it lacks discrimination between the scope, character, methods and intentional aims of both authors. Blackstone is more purely academic. The first edition of his Commentaries—the subsequent ones varying but little in the text—was an enlargement of Lectures to students at Oxford, and not to students in the Inns of Court. It was published five years before he ever knew judicial labor of any kind. It was never intended to be an exhaustive legal treatise, nor was it written to supply judges and practitioners with a vade mecum. It became so in spite of itself. It was a series of elegant essays based on Hale's History of the Common Law and Hale's Analysis, and its marked and continued success was and is due to its magical treatment of matter which Coke and Finch and Wood and even Hale had failed to popularize. His marvellous power lay in his ability to compress much matter into general statements, accompanied by unrivalled skill in polishing accepted definitions. Dealing with the rubbish as well as with the imperishable legal riches of a thousand years, he threw them into an alembic and distilled from a turbid stream a limpid fluid which a thirsty profession quaffed with delight. His work made no pretence to case analysis, to the discussion of mooted questions, nor to the weighing of authority. Its recent regrettable disuse in Law Schools is due to the unreasonable exaction of duties which it was never intended to perform. This is unfair to Sir William.

Kent, on the other hand, had twenty-five years of judicial service before he attempted his Commentaries. His first futile efforts as a lecturer he discarded, and he himself frankly tells us that he needed judicial experience to teach him precision. The difference in method is apparent at a glance. He never writes a sentence without a careful sifting of the books. He writes as a judge would write, and cites and weighs authority. He can be relied on by judges in the pinch of an actual case. He is ever aware that a slip would injure him in the estimation of experts. He wrote for the profession in America. He meant to do so, and hence, his methods being judicial, his work will stand a test which cannot and ought nót to be applied to Blackstone.

In scope, too, the works differ materially. The first volume of Kent discloses this. International Law and the Constitutional Jurisprudence of the United States are broader fields than Blackstone essayed. Even in the chapters on the Sources of the Common Law and the admirable although concise Summary of the Civil Law, Kent is active in surveying fields which Blackstone indicated but casually. The remaining volumes could be readily cut into separate technical treatises upon the topics they discuss, and be regarded as safe guides to those general principles which have escaped the scythes of legislators and the inevitable changes due to the mutations of time. Law can never be static, although principles are eternal.

In style, too, the men differ. Blackstone's is better sustained throughout. Open him at any page and his charm presents itself and is never lost, but while his flights are above ground they are never breathless. It is not so with Kent. His average is the calm severity of a judicial opinion, but at times he breaks away and soars to almost dizzy heights. Both dealt with the same system of the Common Law, but both have marked characteristics. Gainsborough and Sir Joshua Reynolds both painted portraits of Blackstone, but one cannot confuse the style of the artist. I would award the palm to Kent, with this reservation, that Blackstone's style is that of 150 years ago, the style of Pope, and that Kent has a double advantage in being nearer to our own times, and also in that he wrote at the age of sixty and upwards, while Blackstone wrote between his thirty-fifth and fortieth year. A deeper and longer saturation for twenty-five years in the essence of English law gave Kent a spirit of reverential enthusiasm which Blackstone never approached in his most animated passages. It is this spirit which burns like sacred fire in the pages of Kent. Allow me but two illustrations before I close. In Blackstone's text not even the name of Shelley's case is mentioned: in Kent there are twenty pages in exposition of the famous Rule. Listen now to his lament over its abolition in your State:

"The judicial scholar, on whom his great master, Coke, has bestowed some portion of the 'gladsome light of jurisprudence,' will scarcely be able to withhold an involuntary sigh, as he casts a retrospective glance over the piles of learning, devoted to destruction by an edict as sweeping and unrelenting as the torch of Omar. He must bid adieu for ever to the renowned discussions in Shelley's case, which were so vehement and so protracted as to arouse the sceptre of the haughty Elizabeth. He may equally take leave of the multiplied specimens of profound logic, skilful criticism, and

refined distinctions, which pervade the varied cases in law and equity, from those of Shelley and Archer, down to the direct collision between the courts of law and equity, in the time of Lord Hardwicke. He will have no more concern with the powerful and animated discussions in Perrin v. Blake, which awakened all that was noble and illustrious in talent and endowment, through every precinct of Westminster Hall. He will have occasion no longer, in pursuit of the learning of that case, to tread the clear and bright paths illuminated by Sir William Blackstone's illustrations, or to study and admire the spirited and ingenious dissertation of Hargrave, the comprehensive and profound disquisition of Fearne, the acute and analytical essay of Preston, the neat and orderly abridgment of Cruise, and the severe and piercing criticisms of Reeve. What I have, therefore, written on this subject may be considered, so far as my native state is concerned, as a humble monument to the memory of departed learning."

No man but one with a loving knowledge of the books named could have written that passage, and no man but a master of the glorious strength of the English tongue could have so expressed himself.

It is commonly supposed that legal literature is repulsive, because of technicality, or because of some inherent difficulty in comprehending it. This is far from true. Any reader of Macaulay can read with pleasure Blackstone's account of the Rise and Progress of the English Constitution contained in the last chapter of the fourth book of his Commentaries; and as to Kent himself, he presents the argument in favor of lay reading of legal literature in a passage of such unrivalled splendor that I prefer to quote it at large:

"The reports of cases since the middle of the last century, ought, in most instances, to be read in course, and they will conduct the student over an immense field of forensic discussion. They contain that great body of the commercial law, and of the law of contracts, and of trusts, which governs at this day. They are worthy of being studied even by scholars of taste and general literature, as being authentic memorials of the business and manners of the age in which they were composed. Law reports are dramatic in their plan and structure. They abound in pathetic incident and displays of deep feeling. They are faithful records of those 'little competitions, factions, and debates of mankind' that fill up the principal drama of human life; and which are engendered by the love of power, the appetite for wealth, the allurements of pleasure, the delusions of self-interest, the melancholy perversion of talent, and the machinations of fraud. They give us the skilful debates at the bar, and the elaborate opinions on the bench, delivered with the authority of oracular wisdom. They become deeply interesting, because they contain true portraits of the talents and learning of the sages of the law.

"We should have known but very little of the great mind and varied accomplishments of Lord Mansfield, if we had not been possessed of the faithful reports of his decisions. It is there that his title to the character of 'founder of the commercial law of England' is verified. A like value may be attributed to the reports of the decisions of Holt, Hardwicke, Willes, Wilmot, DeGrey, Camden, Thurlow, Buller, Kenyon, Sir William Scott, Grant, and many other illustrious names, which will be immortal as the English law. Nor is it to be overlooked as a matter of minor importance, that the judicial tribunals have been almost uniformly distinguished for their immaculate purity. Every person well acquainted with the contents of the English reports must have been struck with the unbending integrity and lofty morals with which the courts were inspired. I do not know where we could resort, among all the volumes of human composition, to find more constant, more tranquil, and more sublime manifestations of the intrepidity of conscious rectitude. If we were to go back to the iron times of the Tudors, and follow judicial history down from the first page in Dyer to the last page of the last reporter, we should find the higher courts of civil judicature, generally, and with rare exceptions, presenting the image of the sanctity of a temple, where truth and justice seem to be enthroned, and to be personified in their decrees."

Gentlemen: Those are not the words of a blind idolator. They are the words of a high priest at the altar in the Temple of Justice.

Fortunate Senex, tua opera Manebunt!

PAR VALUE VERSUS NO PAR VALUE STOCK

By Henry E. Colton
Of the Nashville, Tennessee, Bar

WITHIN the past six years more than twenty States have adopted Laws authorizing the organization of corporations with "Stock Without Par Value." A great number of large and sound corporations have recently been organized under these laws.

Mr. William W. Cook, in his article, "Stock Without Par Value," [1] appearing in the October Issue of the American Bar Association Journal, finds in this recent and rapid development of laws authorizing Corporations with stock without nominal or par value a serious menace to the investing public and creditors.

In his opinion "Stock Without Par Value" will facilitate fraud and deception, rob the investing public and creditors of the protection now afforded by stock of specified par value, permit stock watering with impunity and render the "Trust Fund" Theory in respect to capital stock of no avail.

Mr. Cook claims that the evils which will result from corporations with stock without par value are so great that they should be prohibited altogether or that the exemption of stockholders from personal liability for corporate debts should be withdrawn. Such discrimination in favor of corporations with stock of specified par value and against corporations with stock

[1] Messrs. Hollen and Tuthill, in an able article appearing in the Journal for November, question, both upon principle and authority, the soundness of the views expressed by Mr. Cook. It is therefore the purpose of this article, with as little duplication as possible, to discuss certain phases of the question which they did not consider or considered but briefly, particularly the concrete evils attending the issue of stock of specified par value, the practical advantages of no par value stock and the impropriety of discriminating against it. Mr. F. B. Odlum of the Electric Bond and Share Company, who has devoted a great deal of time to this subject, in urging a further answer to Mr. Cook's article, has furnished me with a list, too numerous to repeat here, of substantial conservative companies which have recently issued no par value stock.

without specified par value would doubtless effectually stifle the growth and development of the latter.

In modern business the legitimate demands for capital is so great, the actual control exercised by the small stockholder over corporate business, so slight, that corporations with stockholders exempt from personal liability or whose liability is restricted within narrow limits, have become a business necessity. The laws of every State recognize this by exempting the stockholders from personal liability or by strictly limiting their liability. These laws, whether relating to corporations with nominal or specified par value or to corporations with stock without nominal or specified par value, grant this exemption from or limitation of liability only upon specified conditions and contain various provisions designed to protect the investor, the creditor and the employee.

The discrimination against no par value stock proposed by Mr. Cook is wholly unjustified. The benefits which Mr. Cook finds in stock of nominal or specified par value have little basis in fact. The nominal or specified par value is in many, if not most cases, merely a false label. The growth in corporations with stock without par value is based upon legitimate business demands. The dishonest promoter prefers the false label, "Shares of $100.00 Each." He secures this label with practical impunity. The label, instead of protecting the public, helps to deceive it.

The nominal or specified par value stock is clearly a false or misleading label unless it is actually worth in dollars and cents its face value. It frequently does not even remotely approximate its par value either at the time of its issue or subsequently. For over one hundred years stock with a nominal or specified par value has been the rule. The history of the great corporate combinations and of the small corporations alike show that over-capitalization of corporations with stock with nominal or specified par value is the rule rather than the exception.

As Judge Wooley points out in United States vs. United States Steel Corporation et al (223 Federal 167), the various combinations brought together under the United States Steel Corporation "were made upon a scale that was huge and in a manner that was wild" and "in many instances, capital stock was issued for amounts vastly in excess of the values of the properties purchased."

Charles M. Schwab, in recommending to his associates the sale of Keystone Bridge Works for $3,000,000.00 in stock of the American Bridge Company, which sale was subsequently consummated in accordance with his recommendation, said, "If we take stock and should only get twenty dollars per share for our stock, we would get all that Keystone is worth.[3]"

In the case of this combination, which is a striking illustration of the methods pursued by the Captains of Industry, fifteen million dollars of the common stock went with the preferred, fifteen million dollars went to the promoters, J. P. Morgan and Company and others, as commission, and the vendors of the manufacturing plants agreed to hold their stock for a period of eighteen months.[3] The purpose of this last provision was probably to give the promoters the first opportunity to unload their stock on the public.

Speaking of the combination of plants under the American Can Company, Judge Rose says in United States vs. American Can Company et al (230 Federal 870-871):

> As a rule, the prices paid were liberal, not only to the verge of extravagance, but in cases almost beyond the limits of prodigality. If Norton sometimes showed the canmakers that there was steel in his scabbard, his hands always dropped gold. The record does not disclose a single case in which the price named in the option did not exceed the value of all the tangible property transferred. The amounts paid appeared to have ranged all the way from 1½ to 25 times the sum which would have sufficed to have replaced the property sold with brand new articles of the same kind. . . .
>
> For every $100 of purchase money, a subscriber was to receive a share of preferred and a share of common stock each of the par value of $100. Some of the sellers of plants took all of the consideration in stock on that basis. Most of them took some of it. Within limits, efforts were made to induce them so to do. They were assured, and doubtless with entire truth, that the new Company could not be formed at all unless the larger part of its stock was subscribed for by those whose plants it was to absorb.

The frequency of similar over-capitalization upon the part of small corporations with stock with nominal or specified par value is too notorious to require argument.

Notwithstanding such over-capitalization, the directors readily find and adjudge and determine that the property acquired is reasonably worth in cash a sum at least equal to the par value of all the stock issued therefor and have little difficulty in supporting their findings by appraisals made under their direction or under the direction of the promoters. Nevertheless, their findings as to value are practically worthless. However, except in very extreme cases, it is difficult to prove intentional or fraudulent over-valuation upon the part of the directors or appraisers employed by them. And where such intentional or fraudulent valuation is so clear as to be capable of proof the parties responsible therefor are apt to be financially worthless.

The capital stock of corporations with stock of nominal or specified par value, therefore affords little or no basis for determining its "genuine capital—the assets permanently devoted to the corporate business as a basis for its business credit, and upon which its hope of profits is rationally founded."[4]

Thus in ordinary business neither the investor nor creditor can safely rely on the nominal or specified par value of the stock as showing even roughly its true cash value.

In the hands of the "Pirates of Promotion" it becomes a dangerous instrument of fraud. John K. Barnes, Financial Editor of the *World's Work*, who in collaboration with Lewis Guenther, had recently made a careful study of these "Pirates of Promotion,"[5] replying to a recent letter of mine, said: "You are correct, I believe, in assuming that the fixing of a par value for a stock is used by the Blue Sky Promoters as an aid in disposing of their worthless issues. The par values that they fix vary from 1 cent a share to $100, depending largely on the size of the pocketbooks against which they wish to direct their attacks. . . . I cannot see any criticism of stocks without par value. Stock really represents a share . . . in a business, as you, of course, know. There is no obligation on a company to pay stock off at any fixed figure, as in the case of bonds, and therefore having a par value for a stock seems to me something of a deception in any

[3] Minutes of Board of Directors of the Carnegie Steel Company, April 17, 1900, record in the Steel case, Gov't Exhibits, Vol. 6, pp. 869-870.

[3] Minutes of the Board of Directors of the Carnegie Company of April 23, 1900, record in the Steel case, Gov't Exhibits, Vol. II, pp.

4. N. A. Petroleum Co. vs. Hopkins, 105 Kans. 165, 181 Pac. 627, State vs. Sullivan 221, S. W. (Mo.) 738.

5. See series of articles appearing in the *World's Work*, entitled "Pirates of Promotion," October, 1918, to March, 1919, inclusive.

case, whether it is an intended deception on the part of the promoter or not."

Stock of specified par value is a direct incentive to over-capitalization. The optimism of organizers and promoters as to prospective profits, the firm determination to make the stock issue large enough to accord with their ideas as to profits, the difficulty of valuing many classes of property, such as unimproved real estate and mines, the frequent intention to dispose of the stock in whole or in part and the well-nigh universal desire to measure their wealth in large figures, all contribute to an over issue of stock of specified par value. A study of the organization of corporations, both large and small, clearly indicates that the promoter and organizer not only deceive others, but deceive themselves and, like many governments, become enamored with the idea that they can add to their wealth by the simple process of printing misleading certificates. The adoption of stock without par value will practically eliminate such incentives to stock watering[6] and will remove a potent instrument of wilful or inadvertent deception.

It is not true that the adoption of stock without specified par value will render of no avail the Trust Fund Theory of capital stock. The extent to which the enforcement of this much criticised theory will be affected by the adoption of stock of no par value, will depend upon the specific provisions of the Laws permitting the organization of corporations with stock without par value and the general law of the State in so far as it affects such corporations. No-par-value Statutes usually contain various provisions, the obvious purpose of which is to secure and maintain unimpaired the capital of the Company for the protection of the investor, the creditor and the employee.

Thus the Laws[7] of Idaho 1921 Chapter 205 provide for, a statement in the articles of incorporation, etc., of the number of shares with par value and the number of shares without par value and the amount of actual capital with which the corporation will begin business (Sec. 1), define what shall constitute the capital or "shares capital," prohibit the corporation from declaring or paying any dividend "out of capital or 'shares capital' or out of anything except net profits or surplus earnings" (Sec. 3), prohibit the corporation from beginning business or incurring indebtedness until full amount of stated capital has been paid in (Sec. 4), permit fully paid non-assessable no par value stock to be issued for the consideration prescribed in the articles of incorporation, etc., or in the absence of such provision therein, for such consideration as may be fixed by the stockholders or by the Board of Directors under authority granted by the stockholders (Sec. 5).

"The intent and purpose of this act" as declared in Section 8[8] "is to require a share of stock to be treated and represented, subject to lawful preference, rights, limitations, privileges and restrictions, as a mere evidence of an aliquot or divisional interest in the assets and earnings of the corporation issuing the same, whatever the extent or value of such assets or earnings may be, to the end that misrepresentation or misunderstanding arising through the difference between actual value of a share of stock and the value appearing on the face of the certificate therefor may be eliminated."

It is doubtless true that the general tendency of the no par value stock laws is to relieve the stockholder and the promoter from the necessity of valuing at their peril the property which they in good faith turn over to the corporation in payment for their stock, but in view of the growing facilities which creditors have to ascertain the financial responsibility of corporations, this additional protection to the stockholder and promoter is not unreasonable.

The evils of over-capitalization which, as shown, are largely the result of the use of stock of specified par value, the powerful instrument which such stock supplies for inadvertent and wilful deception, the difficulty, if not impossibility, of maintaining substantial parity between the cash value and the par value of such stock, and the fundamental nature of a share of corporate stock, all point to the conclusion that the No Par Value Acts will tend to accomplish their purpose of causing "a share of stock to be treated and represented * * * as a mere evidence of an aliquot or divisional interest in the assets and earnings of the corporation issuing the same * * *, to the end that misrepresentation or misunderstanding arising through the difference between actual value of a share of stock and the value appearing on the face of the certificate therefor may be eliminated."

6. Mr. Cook states that "stock without par value looks like a skillfully devised scheme to issue a maximum of watered stock at a minimum of risk." The commonly accepted idea of watered stock is stock of a specified par value issued in excess of the actual value of the assets received therefor.

If this conception of stock watering is correct, there is, of course, no such thing as watered stock in connection with the issue of stock without par value, for there is no stock watering involved in stating that a certificate represents one-tenth of the assets and earnings of a corporation or that it represents one thousandth or one ten-thousandth of such assets and earnings. While it is conceivable that some of the evils of stock inflation may result from the number of shares issued, yet in the case of no par value stock, the certificate does not of itself aid the dishonest speculator or promoter in unloading the stock upon the public at an unreasonable price.

7. The no par value laws of other States, while frequently less elaborate than those of Idaho, are designed to accomplish the same general result and to afford to the investor, creditor and employee substantially the same protection. The general laws of Delaware authorize fully paid non-assessable no par value stock to be issued by the corporation for consideration fixed by the Board of Directors pursuant to authority conferred in the certificate of incorporation or in the absence of such provision by the consent of two-thirds of the stockholders (Sec. 4a), provided "When the whole capital stock of a corporation shall not have been paid in and the assets shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay on each share held by him, the sum necessary to complete the amount of the par value of such share as fixed by the charter of the company or its certificate or incorporation, or such proportion of that sum as shall be required to satisfy the debts of the company, in the case of stock without par value, this liability shall be limited to the unpaid balance of the consideration for which such stock was issued by the corporation" * * * (Sec. 20), "No corporation created under the provisions of this Chapter, nor the directors thereof, shall pay dividends except from the surplus or net profits. Dividends may be paid in cash or capital stock at par, or in the case of stock without par value, dividends in capital stock may be paid at a price fixed by the Board of Directors, but otherwise the corporation shall not divide, or in any way pay to the stockholders, or any of them, any part of its capital stock, except according to this Chapter" (Sec. 35). The Laws of Rhode Island, 1920, Chapter 1935, the Laws of Pennsylvania, 1919, Chapter 363, the Laws of New York, 1921, Chapter 694, and the no par value laws of various other States contain provisions to the same general effect. Mr. Cook's criticism of the New York Statute is apparently directed against the law as it existed prior to the amendment of May 11, 1921, Chapter 694, of the Laws of New York, 1921.

8. The North Carolina Act (1921, Chapter 116, Sec. 6), authorizing the issue of capital stock without par value contains a similar declaration of purpose.

Benjamin Franklin's Will

"The thrift of Benjamin Franklin is reflected in his will. In giving his daughter his king of France picture, set in 108 diamonds, he requests, 'that she would not form any of these diamonds into ornaments, either for herself or daughters, and thereby introduce or countenance the expensive jewels in this country.' He concludes his will with this clause: 'I would have my body buried with as little expense or ceremony as may be.'"—*Thrift Magazine.*

CURRENT LEGAL LITERATURE

A Guide to Current Legal Periodicals and to Recent Books in Law and in Neighboring Fields

JEREMIAH SMITH, who died September 3, 1921, at the age of eighty-four, was appointed to the bench of the Supreme Court of New Hampshire in 1867, retiring after seven years because of ill health. He became Story Professor of Law in Harvard University in 1890 and completed twenty years of distinguished service in that position. His writings on questions in the modern developments of the law of torts are valuable contributions to legal science. His father, who was Chief Justice and Governor of New Hampshire, was born in 1759 and served in the Revolutionary War. "Jeremiah Smith," by Joseph H. Beale, Harvard Law Review (November).

William W. Cook of New York City examines the need and difficulties of raising sufficient capital for the rehabilitation and extension of our railways and concludes that governmental refunding and guaranty with control (but not ownership) through a regional organization must be the outcome of present *railway difficulties*. Harvard Law Review (November).

Four distinct theories as to *the nature of ownership of community property* all found in the cases are critically examined by Alvin E. Evans in the November issue of the Harvard Law Review.

It is to be hoped that readers have so generally learned to examine book reviews for material of much greater interest and importance than might be expeced in such places that one need not deplore the growing practice of storing material of general value in such out-of-the-way places. A case in point is Albert Kales' review of *Training for the Public Profession of the Law* in the November issue of the Harvard Law Review.

E. Merrick Dodd, Jr. of Boston examines very carefully the new doctrine of *the supremacy of admiralty over the common law* as that doctrine appears in recent decisions of the Supreme Court of the United States and concludes that it is "without substantial support either in the language of the constitution or in the previous judicial history of the subject."—Columbia Law Review (November).

A careful, able and stimulating examination of liability without fault in the civil and common law has been begun in the Illinois Law Review (November). The author is Kenzo Takayanagi of the Imperial University of Tokio.

In the journal just mentioned is a discussion of *embargoes and detentions* under early American treaties by J. Whitla Stinson of New York City.

The action of the American Bar Association at its last meeting regarding standards of legal education and the appearance of the report of the Carnegie Foundation on the same subject are combining to make this year notable for the discussion of this important matyear notable for the discussion of this important matter. A statement by Theodore A. Johnson in the Illinois Law Review (November) is therefore timely:

> The lawyer, like Gaul, is divided into three parts: (1) his duty to his clients; (2) his duty to the courts; and (3) his duty to the public. That is the theory. The practice is to educate the first part, neglect the second, and wholly ignore the third. Only a pitiful minority of law schools has any serious study of jurisprudence in the broad sense, or of any "subject" which will place law where it belongs in our scheme of government. Indeed, law is, for the most part, taught as though it constitutes a department of knowledge entirely separate from government, politics, economics, and ethics. These latter are foreign substances.
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> A perusal of the announcements of law schools will show not only such isolation of law, but also that law is so divided into parts that it is necessary to warn the student "that the law is a unit" and that he "should be on his guard against thinking of it as made up of separate water-tight compartments." And this situation is excused on the ground of "pedagogical expediency"!
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> Any immediate relief is not in sight. The latest expression of the American Bar Association on the question of legal education is charged mostly with *time*. Read the Root report, and pick out the expressions. "A three-years' full time course is the desideratum." And the specific recommendations say "two years of study in a college" (Choctaw, or any other study of equal value to the lawyer in fulfilling his duty to the public, will do); in the law school, three years of full time, and a "longer course of part time study," and teachers in "sufficient number giving their entire time to the school" (any A. B. plus LL. B. will meet this requirement). The resolution does insist upon an "adequate library." The word "adequate" in this connection means sufficient for the purpose of enabling a full-time student with a full-time teacher to be busy for three years' time in the study of law. The whole of the recommendations is simply *time* and ability to pass a state bar examination.
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> The resolution is disappointing in that it omits any reference to the content of the law course. The duty of the lawyer to the general public receives scant notice. And nothing is said of the kind of knowledge the lawyer should possess, other than study of law for the required time. Knowledge sufficient to make him able correctly to advise his clients he must have. If he have this knowledge, he may properly be a legislator or a judge.
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> Herbert Spencer has, however, delivered the death stroke to that idea:
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> "Extensive acquaintance with the laws," he says, "may doubtless be claimed by the many barristers and solicitors chosen by our constituencies; and this seems a kind of information having some relation to the work to be done. Unless, however, this information is more than technical —unless it is accompanied by a knowledge of the ramified consequences that laws have produced in times past, and are producing now (which nobody will assert); it cannot give much insight into Social Science. A familiarity with laws is no more a preparation for rational legislation than would a familiarity with all the nostrums men have ever used be a preparation for the rational practice of medicine."
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> Turning to the catalogues of two of the oldest and most famous of American law schools, we find one boldly announcing that it teaches only technical law as it is, and the other indirectly making the same announcement by omitting from the prescribed course of study any matter that might lead the student to study law with a view of understanding it—not merely knowing it.
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> The general public's cynical attitude toward lawyers as a class has, therefore, some justification. One-sided education tells the story. And this attitude of the general public is reinforced by that of publicists and economists. What answer can we make to the strictures of Dr. Richard T. Ely?
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> "We need," he writes, "an adequate modern legal education conceived not from the point of view of private practice, but from the point of view of public interests. We want schools of jurisprudence in the broadest sense. And then as judges, all disclaimers to the contrary notwithstanding, do have real and very great legislative powers, only those should be selected as judges who have an enlightened twentieth century philosophy. . . . They should not only know what the law is, but they should know what modern economic philosophy is. Instead of having had any thorough training in economic philosophy the courts have as a general thing absorbed a philosophy

which is antiquated. . . . Even in the state universities, where public purpose might be supposed to be dominant, law students are trained almost altogether for the private practice of law, for winning cases, and little, if at all, for their public duties. And in all our new measures lawyers are on this account not taking the leadership which should be desired and are sometimes said even to be losing influence. But the coming of a change is clearly seen, as is evidenced in our new departure in introducing sociological jurisprudence in the law schools."

It is a severe criticism of any learned order to say that its members "absorbed" that part of their knowledge which is essential to any constructive services for the public good. But how cutting it is to say "absorbed a philosophy which is antiquated"! The law schools and the courts are, however, open to that very harsh criticism. A little longer time in school, runs the Root report, that Pliny may be read, and equity pursued in four sub-divisions instead of three, to the end that clients may be served "honestly" and "competently" and "unfairness to the public" and "to all members of the profession" be removed.

Moreover, the purely selfish and one-sided education of lawyers and of courts is responsible not only for the cynicism poured upon them, but is also largely responsible for the mass of tumbled legislation abroad in our land. If the courts had been in tune with the settled economic and political philosophy of their day, and had rendered decisions accordingly, our jurisprudence would have had a natural and orderly development, all the while maintaining a coherence and unity now buried beneath a maze of statutory attempts to evade the antiquated philosophy of the judiciary.

Five years beyond the high school is none too far for the law student to go, yet he can travel all that distance in college and law school without understanding the law. It is submitted that the law course needs pruning and deepening and synthesizing much more than it needs lengthening.

Youngstown, O. THEODORE A. JOHNSON.

In the December issue of the Virginia Law Review, John H. Sears of New York City points out some *methods of avoiding taxes* which he regards as both effective and lawful as distinguished from those which constitute forbidden evasion.

There has been begun the preparation and publication of a new series in English Legal History. This series is to be known as the Cambridge Series (Cambridge University Press). It is being edited by Harold Dexter Hazeltine, Downing Professor of Law in the University of Cambridge. There are to be included monographs "based on original researches in manuscript and printed materials, of some special period or of some special topic," studies dealing with the broader aspects of legal evolution and, finally, editions of legal-historical texts hitherto unpublished or uncritically published. The first volume in this series is *"The History of Conspiracy and Abuse of Legal Procedure"* (1921) by Percy Henry Winfield, Lecturer in Law at St. John's and Trinity College, Cambridge. In this volume is a wealth of material for the solution of some of that surprisingly large number of problems, handled by lawyers today, the roots of which delve back into the centuries. It is a work of the higher order.

Lawyers often have to study the merits of particular investment securities, sometimes to advise a client and sometimes to determine whether a client has been the victim of careless or dishonest advice by others. Professor Walter E. Lagerquist of Northwestern University has written a book in which he devotes some 900 pages to the fundamentals in the *analysis of investment securities*. It is a scholarly and authoritative piece of work based on materials gathered in investigations in bond and banking houses. While intended for students of business, it will be welcomed by all lawyers called upon to evaluate investment securities. One buying only a few books in this field would include this title in his list. (The Macmillan Co., 1921.)

The Collected Papers of Mr. Justice Holmes were published this year. Of like richness and ripeness is *The Nature and Sources of the Law* by John C. Gray, LL. D., of which a corrected and enlarged addition by Roland Gray has just been issued. (The Macmillan Co., 1921.) This edition is based on notes prepared by Professor Gray with a view to putting the work in a form to appeal to a larger class of readers. Were praise of such a work needed, one need only quote that memorable sentence from the preface of the first edition:

> The student of jurisprudence is at times troubled by the thought that he is dealing not with things, but with words, that he is busy with the shape and size of counters in a game of logomachy, but when he fully realizes how these words have been passed and are still being passed as money not only by fools and on fools, but by and on some of the acutest minds, he feels that there is work worthy of being done, if only it can be done worthily.

A plan for world peace by disarmament and arbitration based on the sanction of nonintercourse with offending nations is the subject of *The Isolation Plan*, by William H. Blymyer (Cornhill Publishing Co., 1921). In this the second edition there are included the text of the Covenant of the League of Nations, the author's comments on that covenant without and with reservations as well as on the Draft Scheme for the Permanent Court of International Justice.

Those handling questions relating to enemy property in the United States and property of American citizens in Germany and Austria will find very useful for comparative study, at least, *War and Treaty Legislation* by J. W. Scobell Armstrong, C. B. E. (Hutchinson & Co., London, 1921), which treats fully of British legislation and treaties of the war period and their effect on property rights. Translation of pertinent German and Austrian laws are included.

A great deal of practical information on *Federal Corporate Income Taxes* is to be found in a recent book so named. The author is E. E. Rossmoore, C. P. A., formerly with the Bureau of Internal Revenue at Washington. The book was issued before the passage of the taxation legislation of the last extra session of Congress. (Dodd, Mead & Co., 1921.)

Three case-books on Business Law have been published within the past few months. This results from the coincident rise of collegiate training for business in a large number of colleges and universities. An important problem in shaping that training is how to instruct students of business in law as it relates to business. In the three books referred to, this problem has been approached in two ways. *"Commercial Law Cases"* by Professors Harold Perrin and Hugh Babb of Boston University (Doran Co., 1921) takes those law subjects (as classified for lawyers) and presents their elementary principles by means of cases considerably simplified. This work is done well. To the authors of this book the problem is largely one of method of presentation. The other two books seek the realism which the study of cases gives and also attempt to envisage the business problems which confront business men and then "to bring together widely divergent parts of the law" that their bearing on the legal problems in question may be made apparent. These books are: *Law and Business*, Vol. I, by W. H. Spencer of the University of Chicago (University of Chicago Press, 1921), and *The Law in Business Problems*, by L. F. Schaub of Harvard University and Nathan Isaacs of the University of Pittsburgh (The Macmillan Co., 1921.)

CURRENT POLITICAL AND ECONOMIC REVIEW

THE movement for the reorganization of state government has reached large proportions. The November issue of the *American Political Science Review* summarizes a number of recent experiments (Legislative Notes and Reviews, edited by Walter F. Dodd). A Pennsylvania Commission worked on a proposed constitution for the state during an entire year, but the proposition of calling a constitutional convention was unexpectedly defeated at the polls. The draft constitution was chiefly significant for its executive budget features and its language precision. Louisiana lacked the sort of preliminary work that went to waste in Pennsylvania and its new instrument is said to suffer from inconsistent drafting and badly thought out attempts at centralization.

In some ways, the most important advance since the Illinois Administrative Code of 1917 has been taken by the State of Washington. Washington's new code provides for ten departments, nine administrative committees composed of elected officers, and a Governor's Council empowered with general administrative direction. California has just consolidated seventy-five boards and commissions into seven compact departments. Michigan has just carried out a scheme of partial consolidation which sets up an administrative board in which the Governor has but one vote.

The administrative boards set up by Washington and Michigan are doubtful innovations in the opinion of many political scientists since they may scatter responsibility.

The high cost of living has riveted attention on the problems of food distribution. William R. Camp of the University of California has begun a systematic consideration of the matter in the November number of the *Journal of Political Economy*. The Federal Trade Commission and similar agencies, he points out, has operated on the uncertain assumption:

> If the government puts traders upon the same basis they will compete. But if it is not for the interest of traders to compete will they do so? Competition itself has been found to bring about the survival of the most powerful or to encourage an unnecessary number of dealers who may work together for their own protection but not for the solution of the larger problems of the trade. A multiplicity of shippers, wholesalers, and retailers does not solve the problem of produce distribution any more than a multiplicity of distributors that of milk distribution.

The interest in problems of population was especially aroused by the War. The Second International Congress of Eugenics was held in New York City during September and two interesting papers read before the Convention are reprinted in the *Scientific Monthly* for November. "If it be true, as I hold," Major Darwin writes, "that there are hidden forces continually at work tending to relatively increase the rate of multiplication of large numbers of those who are below the average in the various qualities held to be desirable, then efforts to deal with the obviously unfit would not alone stem this tendency toward racial deterioration." He proceeds to make a somewhat qualified assumption that poverty is the measure of competence, and as a remedy for the multiplication of children in poor homes, he suggests the restriction of charity relief.

M. Lucien Marsh discusses the "Consequences of War and the Birth Rate in France." The war meant a loss of 2,000,000 in population to France, if allowance is made for those killed, for the deficient birth rate, and for increased civilian deaths. Privations and "a certain recrudescence of alcoholism, tuberculosis, venereal disease, and various nervous diseases influenced unfavorably the vitality of the nation and the race." Expansion of births is being encouraged today in France by agitation, by family exemptions from taxation, special wages to family heads in certain industries, stringent laws against abortion, and by anti-disease education.

War propaganda has increased our cynicism about the newspaper and the publicity expert. The basis for a rational interpretation of the situation is laid in a series of articles by Walter Lippman in the *Century Magazine* for November and December. He writes of the barriers that exist between us and the facts of contemporary life—"barriers of censorship, propaganda, personal and professional areas of privacy, little time most of us have to give to the study of public affairs, physical difficulty of reaching the vast American public, limitations of interests imposed on us by our social circles, and the chance of distortion and inaccuracy involved in our methods of news transmission." And even when the news surmounts these barriers it is subject to the preconceptions of our own minds, for "We are told about the world before we see it and have stereotypes for each class of phenomena."

Cycle of Strikes! Alvin H. Hansen in *The American Economic Review*, December, charts and discusses them. His thesis is:

> The struggle between labor and capital now becomes most bitter in the years of prosperity. For this there are two reasons: first, it is in the prosperous years that prices and living costs rise; and second, the large profits accruing in years of prosperity give rise to a contest over distribution.

The Shipping Board is the largest enterprise of its kind in the world. E. S. Gregg writes of its failure to function in a discussion: Failure of the Merchant Marine Act of 1920, *American Economic Review*, December. The problems of the Board are legion; they "call to mind an old-fashioned snipe hunt with the taxpayer holding the bag out in the illimitable darkness." Mr. Gregg is highly suggestive.

International trade languishes and unemployment continues. England has a proposal in the Trade Facilities Bill. *The Economic World*, November 26, prints a criticism under the caption: A London Bank's Analysis of the British Government's Bill to Assist Trade.

"How large is the National Income? Is it keeping pace with the growth of population? By what industries is it produced? How is it distributed among our income receivers?" See *The Economic World* of December 3 for a summary of a report soon to be released by the National Bureau of Economic Research, New York.

Can America meet the need of the world for funds for reconstruction granted that we desired to take the lead in the salvaging progress? David Friday, *New Republic*, December 14, points out that our capital accumulation for the current year will amount to more than eight billion dollars. His answer to the question is: "America can meet the pressing needs of the world for funds, if only Europe will adjust its political and industrial institutions so that they will command our confidence."

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STATUTORY ASSAULTS ON THE JURY SYSTEM

Legislation Impairing Functions of Judge Deprives Jury of Needed Assistance and Direction of Court and Results in Popular Discredit of Administration of Justice

By F. W. THOMAS
Of the Asheville, North Carolina, Bar

WHATEVER may be the state of public opinion today as to the value of the jury trial as an institution essential to a free government, it is certain that in the early days of the American Republic it was held in the highest esteem by our colonial ancestors. They were unanimous in revering it as a sacred thing, and nowhere could a voice be heard in hostile criticism of it. Those who opposed the ratification of the federal constitutional plan of the convention of 1787 used with great effect the omission of the plan to provide for the jury trial in civil cases. While the plan, notwithstanding this omission, was ratified, guaranteeing the trial by jury only in criminal prosecutions, the omission was supplied two years later by the sixth and seventh amendments, the first repeating the guarantee of the jury trial in criminal cases and the latter providing that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right to a trial by jury shall be preserved." Mr. Hamilton (Federalist 83, p. 139) informs us of the attitude of the people towards the jury system in his day as follows:

> The friends and adversaries of the plan of the convention (of 1787), if they agree in nothing else, concur at least in the value which they set on the trial by jury; or, if there is any difference between them, it consists in this: that the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation, and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to, as a defense against the oppressions of a hereditary monarch, than as a barrier against the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than useful, as all are satisfied of the utility of the institution and of its favorable aspect to liberty.

It is believed that this unanimous approval of this ancient mode of trial, or rather, of the system as impaired by our modern statutes, does not exist today; and that the reason for this decline of an ancient institution in the esteem of the American people is the result of these statutes, and the radical and important changes which they have made in the part which the judge took in the trial under the time-honored system which our ancestors so much revered.

Nearly all of our early state constitutions contained provisions like the following: "In all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." The jury trial, like everything else of value in the British Constitution, was the result of hundreds of years of experience and evolution, and had become a well established institution by the time our American constitutions were framed. An essential and highly valued element of it was the right and duty of the judge to express his opinion on matters of fact, as well as to instruct the jury on the law in the manner sanctioned by immemorial usage. "The trial by jury was, when the constitution was adopted, and for many generations before that time had been, here and in England, a trial of an issue of fact by twelve men, under the direction and superintendence of a court. This direction and superintendence was an essential part of the trial." (41 N. H. 550, 551.) And Lord Hale said:

> Another excellency of this trial is, that the judge is always present at the time of the evidence given in it: Herein is he able in matters of law emerging on the evidence to direct them (the jury), and also in matters of fact to give them great light and assistance, by weighing the evidence before them and observing where the question and knot of the business lies, and by showing them his opinion even in matters of fact, which is a great advantage and light to laymen. (Hale History Com. law, c. 12.)

Since the making of the early American constitutions, however, several of the states have thought that this ancient mode of trial could be improved on, and the prevalent idea has been that the improvement could best be brought about by minimizing the participation of the judge in the trial. A majority of the states have provided by statute that the judge should not express any opinion to the jury on the facts, and of late years there has been a tendency to hamstring the judge, in the matter of instructing the jury on the law, by providing that he be confined to giving them written instructions, etc. These innovations have not had the result hoped for, but have, on the contrary, impaired the jury system and decidedly reduced its value, in the public mind of America, as a method of ascertaining the facts in judicial proceedings. On this subject Mr. Joseph Choate said in an address before the American Bar Association, I believe, in 1898:

> The only other important defect attributed to the jury trial as conducted from time immemorial is the too prevalent notion that it permits the trial judge too great a power in conducting the trial and guiding the deliberations of the jury, and so jealous have the people in some of the states become of such imputed interference of the judge with the functions of the jury, that in several of the states, instead of taking measures to improve the breed of judges, statutory contrivances have been devised to curtail and impair what seem to me to be the necessary functions of the court, as an inherent part of the tribunal, without which its duties cannot be well and properly performed, whereby frequent failure of justice must eventually result. . . . I can conceive of nothing better adapted than all such devices for mutilating and emasculating the trial by jury, marring its symmetry, and destroying its utility as the best means of ascertaining the truth of the facts for judgment. That they are an unconstitutional invasion of the rights of the courts and the people, in a state whose constitution provides that the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever, may be claimed with great force and probable success. They seem to be clear and palpable encroachments by the legislature upon the judiciary department, . . . But aside from that, my objection is that they tend to disable and impair the jury itself, so far as they tend

to deprive it of the rightful and necessary aid and assistance of the court.

After referring to Judges Shaw and Oakley as fine examples of judicial ability and discretion, he continues:

> But you will say that all our judges are not Shaws or Oakleys. Neither were they in those days. They were the great models. The others differed in degree rather than in kind, as they do now. But if your judges don't suit you, get better ones. Don't remove the ancient landmarks of the constitution and the law, and turn jury trial into a farce. There is no doubt that jurors require such aid and assistance to enable them to perform their duty, and that whatever tends to deprive them of it, in whole or in part, to that extent weakens their capacity and impairs their usefulness.

That these statutory innovations on the ancient jury system have not been found satisfactory is shown by the action of the American Bar Association in 1918. The Association considered that bill then before Congress proposing to make the law of the state on this subject applicable to a United States court held in that state. The Association, with practical unanimity, approved the report of its Executive Committee on this bill, the committee saying:

> Such a statute would in many cases make jury trial a mockery and in fact destroy the jury trial as the term is used in the American constitutions. The Supreme Court has said that a jury trial is a trial "by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and advise them on the facts," and under this statute the jury trial would cease to exist. If it is the object of courts to do justice, it is clear that a statute which deprives the only impartial lawyer connected with the trial of the right to help the jury, by instructing them on the various questions which arise before them, will not promote justice, but will in many cases defeat it, since it leaves the jury to be swayed by appeals to prejudice, by the eloquence of counsel, by misrepresentations of every sort, without that correction which only an experienced and impartial magistrate can supply. If passed, it would degrade the Bench, increase materially the chances of injustice, and enormously enhance the danger that the jury may be swayed by passion and prejudice, with the result that the jury system itself will become discredited and eventually destroyed, thus taking from the citizen the protection which it now affords against the abuse of power.

This expression from experienced and representative lawyers from all parts of the country, who had observed the disastrous effects on the ancient jury system in the state courts of the innovation which the bill in question proposed to extend to the federal courts, is worthy of the serious consideration of all patriotic citizens.

The statutory innovations on the ancient mode which our fathers esteemed so highly, and which they thought they were permanently guaranteeing to their posterity by the constitutions which they framed, should be abrogated and jury trial as known to our ancestors restored in its "pristine purity." At one time it enjoyed the unanimous esteem of the American people, and doubtless would do so again.

A WORN-OUT CUSTOM

Mixture of Fact and Opinion in Nearly All Expert Testimony and Responsibility to Which Expert Witness Should Be Held When Dealing with Former

By WEBSTER A. MELCHER
Of the Philadelphia, Penn., Bar

IT has been recorded that the ancient Arabic physiologists divided human character into four classes: choleric, bilious, melancholy, and phlegmatic—but that the masses added another class, and embodied it in their proverbial saying that "*custom* is a fifth nature."

The forbears of our legal fraternity must, in some form or other, have been a well-established and recognized force among the Arabs even in those times, otherwise there would probably not have been this popular acknowledgment of the "totem-pole trinity"—habit, precedent, *custom*—that ever present, yet intangible something, which so long defies all innovations, and which we now euphemistically term "conservatism." As a mere check to radicalism of all kinds, this is the best, if not the only effectual, remedy; but when it serves to obstruct development that could only be for the public good, it should, to that extent, be denaturized.

It may do very well for poets to tell us that "Whatever *is*, is right," but we all know that the world is full of things that are *not* right, either morally or legally — either according to the decalogue or mere human legislation; yet such things actually exist and continue. The great Sydney Smith was nearer correct when, a century ago, he said, "All *establishments* die of dignity. They are too proud to think themselves ill, and to take a little physic"; and again, "When a man cannot make a coat or a cheese for 50 years together, without making them better, can it be said that laws made in those days . . . need no revision and are capable of no amendment?"

Revision for the sake of *improvement*—and, if need be, in the face of custom—is worthy of our efforts, whether the law affected thereby be based on legislation or on judicial decision; therefore, the writer, both as a lawyer and as a document expert, feels that his natural conservatism will still permit his advocacy of the wider recognition of one great betterment in practice along evidential lines.

Time was when litigants "proved" their cases merely by their own physical strength or prowess; truth and justice had nothing to do with it. Later on, disputes were supposed to be settled by determining the truth from the lips of witnesses relating relevant facts bearing on the question; justice rested with that side which produced the greater number of witnesses. After another cycle, numbers followed might into the discard, and the ruling principle was the veracity of witnesses to the facts; this veracity was sought to be secured by enacting penalties against perjury. Then it was found that often questions could not be determined even by such testimony, which it became necessary to supplement with the mere *opinions* of persons skilled in the particular field of investigation,

who thereupon became known as experts; of course, the perjury statutes could not apply to mere opinion witnesses, and these soon became (like "children's diseases") a sort of necessary pestilence more or less dangerous to everybody. As they became more and more a convenience to litigants, their general danger increased to an alarming extent, and the "experts" justly earned the condemnation of the courts, though they had still to be accepted as witnesses.

Strange to say, it has only been within the recollection of persons now living that any of the so-called experts have seriously tried to be of real assistance in the ascertainment of truth; and it has been within little more than two decades past that the legislative and judicial branches of our government have made the least move to so treat expert testimony as to encourage the good, and eliminate the bad, features thereof. With an instrumentality so necessary, and so well adapted to accomplish wholly laudable results, why not openheartedly and impartially so consider it, and use it so as to get the greatest benefit from it?

At first the rule of evidence was "once an expert, always an expert"—or rather, "once a mere *opinion*, always merely an *opinion*"; in other words, one who was called upon to testify to an opinion, could testify to nothing else, and whatever else he might actually say it was still but an opinion! Until comparatively recently, the law as to expert witnesses was of the most inconsistent and contradictory character; as was said of the principles of equity in the early period of their development, so the law of experts varied according to the size of the judicial foot.

Starting out as a synonym for "opinions," it was especially difficult for minds tending towards the fossilized state to realize that, while expert testimony generally included an opinion, yet in fact it was mostly something entirely different and far more valuable, and need not necessarily even contain any opinion at all.

In order to be an opinion, its formation must be the result of some *voluntary mental judgment* made by the witness; such would *not* be a mere sensation or involuntary emotion, or an intuitive impression, or a mental observation, or the like.[1] A voluntary mental judgment cannot exist without a foundation upon which to rest—there must be something upon which to base it; that foundation consists of certain conditions or circumstances legally known as *facts*. Consequently, every opinion admissible in evidence must be based on facts also in the testimony in the case; that is the reason for the statement that opinion testimony can only be *corroborative* of other evidence.

Originally science was in such a crude state, that expert skill consisted more of mere observation than of experimental study and research, so that expert testimony in the early days was little more than the judgment of observation resting on facts detailed by non-expert witnesses. Even after the period of real scientific research in all branches of study was reached, the courts utterly ignored what then had become an actual condition, and still clung to the old theory. In 1862 it was held in Pennsylvania, that a handwriting expert spoke from no knowledge of his own, but merely pronounced the judgment of skill upon the particular facts proved by other witnesses — a mere conclusion of skill.[2] This decision, however, was rendered before the statute allowed an expert to *compare* writing, and that was its sole justification.

Even in much later years we find courts repeating, as by a species of deaf and blind wrote, "the experts did not testify to any facts, but only to their opinions." Of course, such statements may be true in particular cases — especially where medical experts, or hypothetical questions, are involved—but as a general proposition, and as applicable particularly to so-called "handwriting" testimony, it is practically a *reductio ad absurdum* since the various statutes permitting comparison by experts.

The facts upon which an opinion rests must appear somewhere in the case, otherwise the opinion would be inadmissible;[3] but it is utterly immaterial whence they come or how they get in. They may be derived from personal knowledge or observation, or from knowledge only gained through scientific skill and means; and they may be stated by other witnesses, or by the expert himself; and in the latter case the same witness would testify to both the facts and his opinion thereon.[4]

Now, if an expert can be placed in the position of supplying the facts for his own opinion, it certainly is a distinct gain to the administration of law, because then, while still legally irresponsible for his opinion, yet in setting forth the basic facts therefor, he would be subject to the same penalties for perjury as any other witness to facts, and this would inevitably tend to lift his whole testimony to a higher plane and discourage reckless swearing even as to the opinion, which he might have to justify on cross-examination.

Expert testimony in a given case is to be treated just like any other testimony, regarding the weight to be given it.[5] But why not also treat it like other evidence, *as far as the subject matter will permit?*

With special reference to the popularly miscalled handwriting experts, there has been a marked advance in their value, within the last generation, due to the reduction of most of their work of examining documents to a scientific basis;[6] and the general appreciation of this has been reflected in almost every section of the country, by legislation expressly authorizing them to make direct comparison of documents, in order to therefrom derive a real foundation for a correct opinion. The result is that now such experts do most of the "delving" into the history of questioned documents themselves, and are thereafter allowed to set forth in detail what they so find bearing on the authenticity of the papers; these "finds" are usually described as "reasons" for the opinions, but they are, in reality, the *facts* of the case on which the opinions are based.

The writing experts may do this notwithstanding the documents are the primary sources, containing within themselves the controlling facts, some of which may be visible to everybody, but others only discoverable by scientific skill and instruments.[7] The mere *opinion* of such expert, standing alone, is justly held

1 Beaupre vs. State, 206 S. W. 517; Latham vs. State, 172 S. W. 797; Butler vs. State, 82 S. E. 654.

2 Travis vs. Brown, 43 Penna. St. 9.

3 Shannon vs. Castner, 21 Pa. Super Ct., 294; Gas Engine Co. vs. Electric Co., 43 Pa. Super Ct. 485.

4 Olmsted vs. Gere, 100 Pa. St. 127; Comh. vs. Buccieri, 153 Pa. St. 537; Berkeley vs. Maurer, 41 Pa. Super Ct., 171.

5 Rolland vs. Porterfield, 191 Pac. 913; People vs. Harvey, 122 N. E. 188; Landscrow vs. Graber, 29 M. C. L. R. 174; Jackson vs. State, 57 So. 594; Slaymaker vs. Russel, 28 Lanc. 145; Baird vs. Shaffer, 101 Kans. 585; O'Connor vs. Slaker, 179 N. W. 401.

6 Burtis Will, 43 Misc. N. Y., 437; Frank vs. Chemical Bank, 5 Jones & S. 26; O'Connor vs. Slaker, ante; "Handwriting Experts," 21 Law Notes, 205.

7 Koons vs. State, 36 Ohio, 195; Riordan vs. Guggerty, 74 Ia. 688; Kendall vs. Collier, 97 Ky. 446.

to be of little value; but when supported by cogent reasons, it may amount to overwhelming proof.[8]

A writing expert, having made his comparison and tests, and having testified fully, as is now the custom, does three things: (1) Identifies the papers used, and which are already in evidence in the case; (2) States the conditions and circumstances found by him in those documents, on which he is able to form a judgment; and (3) States his opinion or conclusion, based on those conditions. Although he has been called as an expert, the character of his testimony as an entirety is not, necessarily, conclusively, and unchangeably, fixed by any one of those three things that he does as a witness. He may testify in one or several capacities, and change about from time to time, according to what he is saying at the time; and the legal quality and nature of his evidence will shift about and change accordingly, from point to point.[9]

That there is some sort of distinction between the expert's bare opinion and his "reasons," is now fully recognized, both by the permissive legislation, and by the decisions. While, generally speaking, he may give both his opinion and his reasons,[10] yet, if the data that he sets forth to the jury as the foundation for a conclusion be such that any unskilled person could draw the proper inference therefrom, as well as the witness himself could draw it, then it is superfluous for the witness to state his opinion thereon.[11]

In so far as the witness (though skilled and an "expert") testifies to mere observations, or measurements, or the like — whether his data be obtained through special skill, or by scientific means, or not— he is *not* giving opinion evidence; such being the case, the only possible other kind of evidence that he could give, is *testimony of facts*, and this is just what his "reasons" usually are, and always may be. This has been recognized in analogous cases,[12] and also as to the writing expert.[13] Of the latter it has been well said that he testifies to *more* than mere opinion, when he gives a detailed statement of *facts* relating to the questioned writing—*facts* which were revealed to him by the use of mechanical instruments, and scientifically established to the degree of demonstration; and that the *facts* to which he testifies, concerning the *characteristics and construction* of the questioned writings, are matters within the field of demonstrative evidence.[14]

To illustrate: The writing expert, after proper investigation, may testify that two writings show identical pen and hand positions and mechanical movements, identical muscular powers and limitations of the producing hand, and identical nervous and dynamic characteristics—to say nothing of many other details of style and formation of the written characters; these are all *facts* gathered from skilled microscopic observations and scientific measurements. Or the witness may testify that two documents bearing widely different dates disclosed the use of identical writing instruments or materials, and that the inks on them gave identical age results; these are all *facts* gathered from actual scientific observations and chemical and colorimetric tests and measurements. Or he may testify that the body of a certain document now reading in a certain way had at one time read in an entirely different way, and had been changed by erasure of the former writing and substitution of the later writing; here again, these are all *facts*, the knowledge whereof was disclosed by the expert's microscopic and chemical tests, and by skilled observation.

The foregoing instances are all cases parallel with that of the surveyor who goes out on the ground and, by the exercise of his skill and the use of suitable instruments, measures the length and direction of the straight boundary lines, and the length and degree of curvature of the curved ones, and from these identifies the tract and its boundaries.[15] The writing expert substitutes the straight and curved lines of the writings submitted to him, for the surveyor's lines on the ground or on a plan thereof, and proceeds to do practically the same thing, to a similar end; his statement of the results is none the less testimony of *fact* merely because (as in case of the ground or the plan thereof) the subjects from which he gets his data are also visible to, and before, the jury.[16]

But when the writing expert (in addition to giving his facts) goes on further to say (of the supposed first case) that the writings are by the same person; or (in the second case) were written at the same time—he would then, *to that extent and no further*, be testifying to a mere *opinion*—his resultant voluntary mental judgment, on the facts otherwise stated by him. In the third supposed case, an opinion would be inappropriate.

As to his *facts*, his testimony would properly stand in the same category as any other evidence of fact, and if he wilfully falsified the facts, he would be subject to a perjury prosecution. This would be a distinct gain in the administration of justice whenever expert assistance was needed in a case, and would bring out the real value of the testimony, as well as the real truth in the otherwise difficult case. It is for this reason that such expert (i. e.: skilled) ascertainment of the facts from the documents themselves, and apart from verbal testimony, has been lately held sufficient, in a number of notable cases, to overcome even the contradictory testimony of alleged eye witnesses to the writings.[17] While comparatively few of these cases have yet appeared in the reports, the writer's own experience contains a large number of additional cases ended at once by the exposures and not appealed or reported.

The writing expert's strict *opinion* in such cases is really often superfluous, the mere facts stated by him being sufficient to enable the jury to form its own opinion; the expert's opinion, however, even if expressed, is not binding on the jury, but must be weighed impartially, and followed or not, as thereby determined.[18]

WEBSTER A. MELCHER.

8 Venuto vs. Lizzo, 132 N. Y. Supp. 1066; "Handwriting Experts," 21 Law Notes, 205; Strong vs. Brewer, 17 Ala. 706.

9 Berkeley vs. Maurer, 41 Pa. Super. Ct. 171; "Evidential Quality and Capacity," 80 Cent. L. J. 399.

10 Kansas vs. Ryno, 64 L. R. A. 303.

11 Auld vs. Southern Ry., 37 L. R. 518 (Ga.); Philadelphia vs. Dobbins, 24 Pa. Super. Ct. 136.

12 Brundred vs. McLaughlin, 213 Pa. 115; Jackson vs. Lambert, 121 Pa. 182; Jamison vs. Hawkins, 13 Pa. Super. Ct. 372.

13 Riordan vs. Guggerty, 74 Ia. 688; Koons vs. State, 36 Ohio, 195; Kendall vs. Collier, 97 Ky. 446; Sharon vs. Hill, 26 Fed. Rep. 337; Gordon's Case, 50 N. J. Eq. 397; Green vs. Terwilliger, 56 Fed. Rep. 384; Rice Will, 176 N. Y. 570; Baird vs. Shaffer, 101 Kans. 585; Trust Co. vs. Telephone Co. No. 2, 74 Leg. Int. 630.

14 Boyd vs. Gosser, 83 So. Rep. 758.

15 Brundred vs. McLaughlin, 213 Pa. 115.

16 Koons vs. State, 36 Ohio, 195; Riordan vs. Guggerty, 74 Ia. 688.

17 O'Connor vs. Slaker, 179 N. W. 401; Weber vs. Strobel, 194 S. W. 272; Baird vs. Shaffer, 101 Kans. 585; People vs. Storrs, 207 N. Y. 147; 136 N. Y. Supp. 1144 (later reversed but on other grounds); Wick vs. Roop, 253 Pa. 264 (appealed on other grounds); "Handwriting Experts," 21 Law Notes, 205.

18 People vs. Harvey, 122 N. E. 133; Landskrow vs. Graber, 29 M. C. L. R. 174; Venuto vs. Lizzo, 132 N. Y. Supp. 1066; Strong vs. Brewer, 17 Ala. 706.

PROBLEMS OF PROFESSIONAL ETHICS

Further Discussion of Letters to Creditors in Bankruptcy Proceedings—Correspondent Suggests Analogy of Proceeding to What May Happen at Joint Meeting of All Creditors

TOUCHING the subject of letters written by an attorney to creditors of a bankrupt concern urging them to place their claims in his hands, we said in last month's issue of the JOURNAL that this conduct seems clearly unprofessional. As to that statement, no dissent is brought to our attention.

But we also intimated that while a letter from a creditor to his fellow creditors desiring such co-operation is of course proper, yet that attorney should not permit an enthusiastic client to urge other creditors of a bankrupt to employ the attorney in question.

A brother lawyer in Denver* likens such letters urging the employment of the writer's attorney to a proposal made at a creditors' meeting. Our correspondent says that the attorney himself should not by letter or in person apply to the creditors represented at such a meeting and solicit employment by them, "and so," he says, "the letters in bankruptcy cases should not, I assume, come from attorneys"; yet he pertinently asks: "Suppose that a creditor, at a meeting of creditors, without laudatory words, suggests the name of an attorney; should this not be permitted? And where is the difference between suggesting the name of an attorney in open meeting and writing a letter to the same creditors suggesting this same attorney as a competent man to handle the claims? And our correspondent concludes:

> I wonder why the creditor should not just as freely suggest in his letters the name of his attorney, on the theory that it is just like a joint meeting of all creditors and the suggestion is made that one attorney (being named) should be employed.

Another attorney of wide experience in bankruptcy law complains not so much of the suggestion of employment, as of the time and manner of making it. He says:

> A list of creditors, with the names, addresses and amounts, if not already in the hands of the attorney for the petitioning creditors, is usually given to the attorney, simultaneously with the filing of the petition, and a system of follow-up by sending out letters or communications to the creditors, is pursued. These letters are usually of such character as to impress upon the average layman creditors the belief that the attorney or firm of attorneys is acting in the interest of the creditors. The letter is sent out some considerable time before the schedules are filed, and, of course, there is no access to this list by the creditors of knowledge of who else might be involved.

Adverting again to the reasonable desire of creditors themselves to get their work done effectively, yet at a reasonable cost; and bearing in mind that whatever be the traditions of the legal profession, a merchant is not bound by them, but may properly urge upon others the employment of his own attorney as being a cheaper and more effective means of obtaining results, though each creditor is free to retain a separate attorney, we are led to a qualification of the view expressed in these columns last month.

While we adhere to the view that it is improper for attorneys themselves to do the soliciting, yet we are much impressed with the illustration of a creditors' meeting. The most largely interested creditor is usually in the chair. He has brought his attorney with him to attend the meeting, and to advise him and make suggestions. He usually states something to the effect that he has no wish to require any one to employ his lawyer, that everybody is free to employ his own, but, he continues, it is obvious that where prompt and concerted action is important, one lawyer is better than a dozen; and, especially in the case of small creditors, it is desirable to keep down expense. He concludes by respectfully suggesting that his own attorney is present—perhaps calling for a few remarks from the attorney—and is prepared to take care of any claims which may be committed to his charge and which are not in conflict one with another.

There seems to be nothing wrong about this. It may be that some lawyers regard it as undignified to attend at a creditors' meeting at the "behest" of a client; but there certainly is nothing unprofessional in allowing a client in one's presence to make a statement such as is outlined above. Then is there anything unprofessional in permitting a client over his own signature to circulate a similar statement among creditors with whom he has a common interest? Our correspondent first above quoted says:

> Would you feel that it would be logical to suggest that the creditor's letter should simply point out the desirability of concentration of claims, and should then suggest that if the addressee accepted that view, then the addressee should either ask the writer of the letter for the name of the attorney the writer has in mind, so that the matter might be forwarded direct, or should forward the claim to the creditor with the request that it be handed to the writer's attorney for handling? I really do not feel that such a roundabout method is necessary.

Assuming that we have the sanction of our brother in Denver, we carry a step or two further his analogy between an address by the principal creditor at a meeting of creditors, and a letter from him to other creditors similarly situated. At the meeting, we have supposed his attorney to be present; and we picture creditors gathering about the attorney, and, unsolicjted by him personally, urging him to represent them in the bankruptcy case. Some creditors may abstain, and may prefer to speak to their own personal attorneys. As it would be clearly unprofessional for the attorney in attendance at the meeting to stand at the door and hand out his card and suggest the advantage of retaining him, so would it be unprofessional for him to write letters to creditors generally, urging this course upon them. But whether he be present at or absent from the meeting, and whether he knows anything about what his client says at the meeting, or says in a circular letter, is it not professional for him to accept retainers, unsolicited by him, even though his client in a meeting, or outside a meeting by letter, urges the advantage to be secured by all hands similarly situated retaining the same attorney to represent them?

Again, a client heavily interested as a creditor in a bankrupt concern tells his lawyer that a contest has arisen touching the election of a trustee, or the advisability of continuing for a season in the business of

*Erl H. Ellis, Esq., of the Denver bar.

the bankrupt, or the desirability of accepting a composition. Knowing that his attorney regards it as undignified to leave his office to attend a creditors' meeting, he suggests calling together in the lawyer's office a group of local creditors to discuss the policy to be pursued, and legal methods of attaining results sought. The group gathers, the moving creditor outlines the facts. He states that A. B., the lawyer, has been retained by him and will be glad to render such legal assistance as may be in his power. Without going into details, it is obvious whether the employment of A. B. by the other creditors of the group is mentioned or not —yet, assuming he has their confidence, the advantages of retaining him are unmistakable; and by permitting the meeting in his office A. B. has lent his assistance in creating an atmosphere and surroundings highly favorable to his professional employment by persons who had perhaps never heard of him before the meeting takes place.

Assuming that A. B. assures himself that he is not improperly taking the place of other attorneys already retained, is there any impropriety in his accepting retainers on such an occasion? Upon the whole matter, although we should of course be glad of further light, we conclude that a dignified letter from a creditor to other creditors similarly situated, suggesting the desirability of co-operation and mentioning the name of his attorney who will act if desired, is in effect like a joint meeting of creditors and may well be permitted. Perhaps this is a fortunate conclusion to reach —for it is pretty clear that creditors will continue to write such letters anyway.

And if the hand of the fortunate attorney whose enthusiastic client urges the creditors to unite in retaining him, is discernible in the letter, perhaps a saving sense of humor with which the profession always is blessed may do more than an added canon in the battery of ethics to keep the enthusiasm thus inspired within bounds.

RUSSELL WHITMAN,
Chair. Com. on Prof. Ethics, Chicago Bar Assoc.

Book Review

Le Droit International Public Positif. Par *J. de Louter,* Professeur de Droit international public à l'Université d'Utrecht. Oxford: Imprimerie de l'Université, 1920. 2 vols., 8vo. XI, 576; VI, 509 pp.

This is one of the publications of the Carnegie International Peace Foundation. The author has occupied the chair of international law at the University of Utrecht for more than twenty-five years and has written much on international law and political science. He has frequently served as commissioner on administration of the Dutch East Indies. It was his work, "Staats-en Administratief Recht van Nederlandsch-Indië," published some twenty years ago, that brought him favorable recognition among scholars in this country. In 1910 he published this work on international law at the Hague under the title of "Het Stellig Volkenrecht." He used the word "stellig" ("positive") to emphasize his doctrine that public international law is "positive law," that is, distinctly outside the sphere of mere philosophy or morals. At that time this had a special significance owing to Dr. Thomas Baty, the distinguished English barrister, only the year before having published his "International Law," in which he had opposed a permanent international court because it would be governed by merely "legal" principles. Dr. Baty was answered not only by de Louter but also in France by Léon Bourgeois, the wide-famed statesman, in his "Pour la Société des Nations" (1919), embracing his speeches delivered at the First and Second Hague Conferences, urging acceptance of principles to constitute a recognized corpus of positive public international law. It now belongs to history that the Second Hague Peace Conference did go so far as to render obsolete most of the books on the subject then extant.

In consequence of the erudition, clarity and modernity revealed in the work of Prof. de Louter, the Trustees of the Carnegie Foundation engaged him to prepare in French a new edition to form part of the international law series that the Foundation was then preparing for publication in that language. The outbreak of the World War threatened to end the enterprise but the Trustees prevailed upon the professor to continue his work, with the understanding that he should limit his doctrinal exposition of the subject to the period immediately before hostilities began. This, as he says in the Preface, was "presenter une image fidéle du droit positif en vigueur au moment même où il devait subir une épreuve fatale." In explaining the apparent futility of now publishing a treatise of the law as it was up to 1914 "mais bouleversé et à peu prés détruit depuis lors," he expresses the hope that he is presenting public international law such as it will be when "il est prêt à se relever pour recommencer une carrière honorable et utile."

While some specialists will not agree with all the views of the author, there is bound to be common accord that the work contains evidences of painstaking and limitless research, impartial consideration of the divers authorities in other lands and many languages and a just appreciation of their weight. Few periods, and, indeed, still fewer countries, have escaped the reach of his erudite mind and indefatigable energy.

For the United States, Kent's Commentaries are cited on the second page and in the very first note, followed through the two volumes by quotations from many other authoritative writers and distinguished statesmen, including Franklin, Webster, Sumner, Wheaton, Woolsey, Lieber, Wharton, Choate, Root and others not so well known—some being cited many times. John Bassett Moore, our leading international jurist, recently selected as one of the judges of the Permanent Court of International Justice, is frequently quoted with marked approval.

A most valuable feature of the work is this great mass of supporting authorities, constituting firm and indestructible pillars for the whole work—textually and exegetically. The logical order, the cogent reasoning, the interesting anecdotal and historical references employed to elucidate the various propositions advanced in clear and cultured modern French will strongly appeal to serious readers, whether lawyers or laymen. The author seeks no model for his plan of treatment. There are but three divisions of the work: The first is the *Introduction,* comparing various definitions and marking the traditional eras—Prior to 1648, from 1648 to 1815 and from 1815 to 1914. The next is *Droit matériel,* embracing subjects and objects

of international law and basic treaties, and the third is *Droit formel,* comprising the organs or instrumentalities of international affairs, conflicting interests, war and neutrality.

It is in the *Introduction* that the author reveals his special doctrinal views upon the "positive" basis of public international law. He makes a delightfully logical distinction between "origin" and "source" and signals the confusion that has at times arisen from treating them as synonymous. "La métaphore est empruntée à la naissance des fleuves et rappelle aussitôt qu'on ne parle pas ici de la véritable *origine* de l'eau, qui reste cachée dans le sein de la terre, mais simplement de l'endroit où elle vient à la lumière qui en baigne la surface" (I, 42). He gives notice that he will not deal with law in the meaning of origin, but only "source," as indicating "sa forme perceptible, où le droit international se manifeste." Few writers have equaled the attractive manner in which the author has presented the phases of the relation of international law and other sciences and the historical development of the subject. Where he admits lack of unanimity of opinion he presents the conflicting authorities fairly and dispassionately. He stands for the doctrine: "L'arbitrage n'est applicable qu'aux conflits juridiques" (II, 191) and devotes many pages to outlining the formative steps for an international tribunal along the lines considered at the Second Hague Conference.

It is gratifying to know that many of his ideas correspond with those which last year Mr. Root successfully urged before the Committee invited by the Council of the League of Nations to prepare a plan for the Permanent Court of International Justice, the judges of which have but lately been elected.

Among the particularly interesting sections are those covering "Les Conflits" (II, §§ 37-41), under which the history of peace efforts is narrated. Here the author shows an extraordinary familiarity with legal literature in this country by citing the two works of Thos. Willing Balch, the scholarly Philadelphia lawyer-author, on *Emeric Crucé,* the great French advocate of arbitration of the seventeenth century, and the translation of his little work called *Le Nouveau Cynée* (II, 113). Not many, even in America, know of these two privately printed and highly prized books. It is not surprising, therefore, to also find a thorough consideration of peace efforts in this country, including the founding of the still active *American Peace Society* in 1828 as an enlargement of similar societies in three states in 1815, founded by David Dodge and Noah Worcester, and references to the pamphlet of William Ladd, published in 1840, proposing a conference of delegates from all civilized nations to fix international law by treaty and assure peace by the creation of an international court of justice (II, 114). It is a striking coincidence that the man who then vainly urged these ideas in Europe and the man who successfully urged them in 1920 had the same given name—Elihu Burritt and Elihu Root.

The author is not of those who believe war can be abolished, but he quotes with approval Parieu, the great French Pacifist: "La paix éternelle est impraticable mais indéfiniment approximable" (II, 220). As to the steps in that direction, particularly by restriction of armaments, now so apropos, the reader will nowhere find a more interesting and learned historical review, including every shade of opinion the various governments and publicists have entertained (II, 109-126). The reason for the failure of the Second Peace Conference on the armament question is simply put: "*Une mutuelle méfiance* empêcha toute entente des puissances européennes quant à la restriction éventuelle de leurs forces navales" (II, 323). Attention is called, however, to the treaty between Argentina and Chili in 1902, renouncing naval construction then in progress, agreeing to diminish their squadrons and declaring a naval holiday for five years. This led to the erection of the peace monument on the mountainous boundary line between the two countries known as "The Christ of the Andes."

The author evidently found it difficult to confine his work to the status of international law in 1914, for in many instances he has referred to the Great War. As to neutral territory being crossed by belligerent troops, he says in a note: "En 1914, les armées allemandes traversèrent la Belgique malgré ses protestations, malgré *sa neutralité permanente et garantie*" (II, 423). Under the heads relating to submarine and aerial war engines, he has also deemed it permissible to utilize data of the late conflict.

No reader of this work can fail to be impressed by its many high qualities but he will experience some chagrin and be put to unnecessary trouble by the lack of index, list of authorities, explanation of abbreviations and adequate table of contents. There are also a few mistakes in the names of authors cited and occasional errors in spelling. As illustrations—"Sumner" is cited as "Summer," "Willing" is given as "William," and "impraticable" is spelled "impracticable." These features are regrettable in so valuable a work and somewhat surprising in view of the manifest expense of production and the typographical reputation of the Oxford University Press. The need of index and list of authorities is really great enough to warrant publishing them as an addendum, which it is hoped will be done.

WILLIAM W. SMITHERS,
Chairman of Comparative Law Bureau.

Death of Mr. Lynn Helm

Lynn Helm, formerly referee in bankruptcy in Los Angeles, second President of the California Bar Association, for many years an active member and official of the American Bar Association, and a well known lawyer both in Chicago and on the Pacific coast, died suddenly at his home in Los Angeles on Sept. 23. He had been in ill health for several years.

Mr. Helm was born in Chicago, received his collegiate training at Princeton University, and studied law in the office of his father, Henry T. Helm, of the Chicago bar. He was admitted to the bar in 1881. He practiced in his native city until 1896, when he removed to Los Angeles, where he entered the practice.

Clerk of U. S. Supreme Court

"The appointment of Mr. William R. Stansbury as Clerk of the Supreme Court of the United States, while fully expected, is none the less gratifying. His long connection with the clerk's office and his thorough knowledge of its duties admirably equip him for the position, and assure the high standard of efficiency established by his predecessors will be maintained. Mr. Stansbury begins his duties as clerk coincident with the assumption by Mr. Chief Justice Taft of his active duties with the court; and not only the bar but the entire country wish for each of them a long and distinguished service.—*Washington Law Reporter* (Oct. 7).

ACTIVITIES OF STATE BAR ASSOCIATIONS

Secretaries of State Bar Associations are requested to send in news of their organizations. "News" means not only official statements of time, place and programs of regular meetings and the action there taken, but also reports of other interesting activities. In brief, anything showing what the membership, committees and leaders in the State Bar Association are thinking and doing with respect to matters of professional interest.

Secretaries can help to make this department one of the most interesting in the Journal. The collection of reports will enable each State Bar Association to see every month what the others are doing and to avail itself of any suggestion contained in their activities. Contributions should be mailed not later than the 25th of each month and should be addressed to the editorial office, 1612 First National Bank Building, Chicago.

ILLINOIS

Solving Problem of Legal Aid for Poor in Smaller Cities

The matter of Legal Aid for the Poor in the larger cities has generally been handled by voluntary organizations with a central office and corps of assistants. In the smaller cities with populations of from 25,000 to 200,000 there is not sufficient call for such services to justify the operation of such a central office. Recently the Family Social Work Societies of the State of Illinois and the Illinois State Bar Association have tried to solve the problem in this class of cities by an arrangement which we understand is unique but may work out.

It is agreed that the State Bar Association will secure the aid of the various local bar associations in every city where there is an organized Associated Charities and have such local associations appoint a committee of one or two to act jointly with the Associated Charities Secretary or Manager in determining the general policies to be followed in legal aid work. The local bar association will furnish such Associated Charities with a list of their members who are willing to contribute their services without charge on properly signed orders from the Associated Charities Societies. Whenever a case comes to the latter which requires legal aid an order will be issued upon the members of the local bar in rotation so that no lawyer will have to do more than his share of the work. In event there are cases in which a small fee should be charged the local committee representing the bar will in all cases decide whether a charge should be made and the amount of the same.

The Illinois State Bar Association has taken this matter up with about fifteen local bar associations and there has been a very generous response. They have already taken up the work and made their arrangements with the local manager.

The various secretaries of the charitable organizations are expected to report to their state organization by the first of May and we hope to have a definite statement of results of this work by the 1922 annual meeting.

R. Allan Stephens,
Secretary.

Banquet In Honor of Supreme Court Judges —Memorial to Lawyer Soldiers

The annual banquet in honor of the Judges of the Supreme Court of Illinois given by the State Bar Association, at the Drake Hotel on December 10, was largely attended and was a very successful affair. President Silas H. Strawn of the State Bar Association presided. Chief Justice Stone spoke on behalf of the justices. President Cordenio A. Severance of the American Bar Association made a talk in which, among other things, he appealed for support for the measure pending at Washington to improve the federal judicial machinery. The formal address of the evening was delivered by Nicholas Murray Butler of New York, on "The Changing Foundations of Government."

December 15 was also a notable day. The Supreme Court adopted a motion of the Committee on Soldier Memorials of the Illinois Bar Association that the names and memorials of those who died and the names and records of those who served in the Great War be preserved in the records of the Supreme Court. Major Edgar B. Tolman presented the motion for the Bar Association, and Mr. Justice Carter responded for the Supreme Court. Chief Justice Stone then announced the order of the court that the motion be carried out.

The Supreme Court has adopted the rule of the United States Supreme Court which requires applicants for admission to the Bar to appear in person. Heretofore the practice has been to mail commissions and to permit the young lawyers to take their oath before a notary public. The Illinois Supreme Court was even able to improve upon the procedure of the Federal Supreme Court by having the motion for admission made by the Chairman of the Board of Law Examiners, who presented the names of those recommended in a body at the session on December 15. Chief Justice Stone addressed the applicants on the duty of upholding the ideals and the honor of their calling.

After this ceremony the Illinois Bar Association gave a luncheon at the Leland Hotel to the newly admitted members. A table was assigned to each Justice of the Supreme Court and each ex-President of the State Bar Association, and seven of the neophytes were then placed at each of these tables. Col. Buckingham of Chicago made an extremely good address to the new members at this luncheon.

KANSAS

Recommendations on Legal Education—Progress of Law Revision—Incorporation Defeated

The Bar Association of the State of Kansas met in their 39th Annual Meeting in Hutchinson, Kansas, on November 21st and 22nd. Several matters of particular importance came before the association.

Considerable discussion arose over the question of legal education, and it was finally recommended to the board of bar examiners that all who sought admission

to the bar who were studying in offices should be required to put in all their working time on their studies for a period of three years, and a longer period equivalent in number of working hours, if only a part of their time was devoted to studies. The balance of the report by the committee with reference to requiring graduation from a law school as a requisite for admission to the bar was referred back to the committee to report at the next meeting.

The work of the committee on the revision of the laws of the State of Kansas came before the association for report and discussion. It was found that this work was progressing in an excellent fashion, and that probably with another year the lawyers of the State could expect a complete revision of the statutes.

The discussion of the question whether the Bar Association should make recommendations to the electors with reference to candidates for judicial offices in the State came before the association for discussion, and the matter was referred to a committee of seven to recommend back to the association a plan by which the bar of the State may exercise its influence in the election of a non-political judiciary.

On the morning of the second day of the meeting the Supreme Court convened in regular session for the first time in its history that it has ever met outside of the State capital. This was for the purpose of holding a memorial service for the members of the bar of Kansas who have given their lives in the great war. At this service, a large bronze memorial tablet was presented by the Bar Association to the Supreme Court and the Bar of the State, in order that for all time there might be preserved a record of those who made the supreme sacrifice.

The question of incorporation came before the meeting, and after a discussion lasting a greater portion of the evening, the matter was defeated, so that for some time at least the Bar Association of the State of Kansas will seek some other plan of organization than that of incorporation.

Salina, Kansas, was selected as the meeting place for next year, and the following officers were elected: Senator Chester I. Long, Wichita, President; Judge W. C. Harris, Emporia, Vice-President; Forrest Seifkin, Wichita, Treasurer; W. E. Stanley, Wichita, Secretary.

The following were elected delegates to the American Bar Association: J. Graham Campbell, Wichita; Geo. F. Beasley, Girard; James H. Wendorff, Leavenworth.

On Monday evening the Bar Association listened to a most excellent address on "Present Day Problems," delivered by Cordenio A. Severance, President of the American Bar Association. His presence at the meeting of the association was deeply appreciated and his address was one which will be remembered by an enthusiastic audience who heard it for a long time to come.

On the evening of the second day the banquet was held. Many interesting addresses were listened to. The association likewise enjoyed a most excellent barbecue given by Judge Martin the afternoon of the second day.

KENTUCKY

Special Committee Advises Against Calling Constitutional Convention

The Special Committee appointed by the President of the Kentucky State Bar Association to consider the advisability of calling a Constitutional Convention in Kentucky, met at the Court House in Louisville on Friday, December 9th, 1921, at 10 A. M.

The meeting represented all sections of the State, and a long and vigorous discussion was had with reference to the matter under consideration. The opinion was quite generally expressed that there was no widespread demand for a new Constitution; that such evils as existed in the present Constitution could best be done away with by amendments, and that if this be not true, it is much better to bear the evils we have than to fly to those we know not of.

The Committee adopted a resolution to the effect that it was inadvisable to call a Constitutional Convention, but further adopted a resolution favoring an insertion in the Constitution of a more liberal provision as to amendments thereto, as follows:

> Resolved, that it is the sense of this Committee that it is advisable that Section 256 of the Constitution of Kentucky be amended by striking from the same the following lauguage, viz.: "Not more than two amendments shall be voted upon at any one time, nor shall the same amendment be again submitted within five years after submission"; and by substituting the following language in lieu thereof: "Not more than four (4) amendments shall be voted upon at any one time, nor shall the same amendment be again submitted until the fourth regular general election, after its first submission to a vote of the people."

The meeting was called to order by the Chairman, Mr. Robert F. Vaughan. Those present were: Robert F. Vaughan, Chairman, Louisville; John S. Kelley, Bardstown; L. A. Faurest, Elizabethtown; John D. Carroll, Frankfort; George C. Webb, Lexington; George B. Martin, Catlettsburg; Henry Hughes, Paducah; H. B. Mackoy, Covington; Kirby Gordon, Madisonville; Hubert Meridith, Greenville; Alex G. Barret, Louisville; Atilla Cox, Louisville; John K. Todd, Shelbyville; J. Verser Conner, Louisville, Secretary.

The regular annual meeting of the Association is generally held in July, but at the last meeting of the Executive Committee it was ordered that a special one-day meeting be called, to be held in Louisville on December 28th, at the same time that the Circuit Judges Association and the Commonwealth Attorneys Associations of the State meet in Louisville, said meeting being for the purpose of receiving the report of the Special Committee heretofore referred to.

A banquet will be given on the night of December 28th, for the Commonwealth Attorneys, Circuit Judges and members of the Kentucky State Bar Association.

J. VERSER CONNER, Secretary.

MISSOURI

Delegates Appointed to Conference on Legal Education

The Missouri Bar Association held its annual meeting in Kansas City on December 1st and 2nd. Mr. C. W. German, Commerce Building, Kansas City, Missouri, was elected president of the association for the ensuing year.

The Committee on Constitutional Revision had prepared a tentative report involving a change in the judicial system. This report met with much opposition but after debate the committee was continued for the purpose of collecting additional information, with the understanding that no report would be submitted to the coming Constitutional Convention until it had been approved by the association.

It is expected that a Constituonal Convention will be convened in Missouri some time next spring. Ac-

cordingly, it was the sentiment of the members to have the next meeting of the Bar Association held in Jefferson City some time during the summer.

The Bar Association adopted an amendment to its constitution providing for a committee on judicial candidates. It will be the duty of this committee to form, from time to time, a joint organization composed of its own members and delegates from local bar associations for the purpose of making recommendations with reference to the appointment and primary nomination of judges to the appellate courts in this state and federal courts having jurisdiction in Missouri.

The by-laws of the association were amended so that the dues of the association were doubled. It is hoped that this action will provide sufficient funds so that the association may be an effective organization with a secretary devoting his entire time to its work.

The Association authorized the appointment of three delegates to attend the convention of Bar Association Delegates to be held in Washington to discuss a means of securing more effective legal education throughout the nation.

KENNETH C. SEARS, Secretary.

OKLAHOMA

Program for Fifteenth Annual Meeting Contains Interesting Features

The program of the Oklahoma State Bar Association for its annual meeting, December 29th and 30th, at Oklahoma City, is exceptionally well balanced.

The committee reports show deep study and much work. These committee reports have been printed and mailed to each member of the association so that the problems presented by the committees can be studied by the members before the meeting and an intelligent discussion may thus be had.

Two excellent papers will be read: one by Russell G. Lowe of the Oklahoma City Bar on Probate Sales, and one by Enloe C. Vernor, County Judge of Muskogee County, on Juvenile Punishment and Reform.

The annual address will be delivered by the Honorable W. L. Freierson, Chattanooga, Tenn., former Solicitor General of the United States.

The question of the future of the Bar Association will be discussed after the report of the delegates of the State Association to the Conference of Bar Association Delegates, by Mr. H. D. Henry of Mangum and J. R. Spielman of Oklahoma City.

Oklahoma, in common with many of the states, has long discussed the congested condition of the appellate court docket, and many excellent reports of standing and special committees on this subject have been read and considered by the Association. One of the features of this meeting will be an endeavor to get a permanency in the organization of a committee to study problems of Court Organization, Procedure and Practice, such committee to be made up of lawyers representing at least all the judicial districts of the state who are interested in the problem and are willing to give the time necessary to work it out.

The committee suggests that by this means and by keeping the personnel of the committee as permanent as possible the work of each succeeding committee will not be lost. Furthermore, it is suggested that such a committee by frequent reports of progress will be the means of educating the Bar and public on this vital subject, so that in the not distant future practical plans can be worked out which will be understood by all and meet the approval of such a number of the Bar and public as to be assured of adoption.

The Committees on Commercial Law, Grievances, Law Reporting and Digesting, and Jurisprudence and Law Reform, Judicial Administration and Remedial Reform, and Uniformity of Laws, have all submitted interesting reports which have been printed and sent out to the members. The Committee on Legal Education and Admission to the Bar has asked additional time and its report will be submitted at the Association's meeting.

The meeting of the Association will be held at the Huckins Hotel.

VERMONT

Program for Forty Fourth Annual Meeting, to be Held at Montpelier

The forty-fourth annual meeting of the Vermont Bar Association will be held at Montpelier, Vermont, January 3-4, 1922.

At the afternoon session of January 3rd, the Annual Address will be delivered by the President, Hon. John W. Redmond, of Newport, Vermont. This will be followed by a memorial sketch of the life of the late Justice Sececa Haselton, by Hon. Robert Roberts, of Burlington, Vermont. Also a memorial sketch of the life of the late Hon. Charles A. Prouty, by Hon. George B. Young, of Montpelier, Vermont. The remainder of this afternoon session will be taken up with committee reports.

The address at the evening session, which will be one of the chief events of the meeting, will be delivered by Hon. Alton B. Parker, of New York City.

The morning session of January 4th will be given over to further committee reports. Also at this session there will be a memorial sketch of the life of the late Chief Justice Loveland Munson, by Hon. James K. Batchelder, of Bennington, Vermont. Justice George M. Powers, of the Supreme Court of Vermont, will also deliver an address.

Aside from further committee reports at the afternoon session, there will be a memorial sketch of the life of the late Superior Judge Zed S. Stanton, by Hon. Frank Plumley, of Northfield, Vermont. Hon. Hale K. Darling, of Burlington, Vermont, will also deliver an address on the subject of "Declaratory Judgments."

At the banquet on the evening of January 4th, speeches will be made, it is expected, by Governor James Hartness, of Springfield, Vermont, by Hon. Henry F. Hurlburt, of Boston, Mass., by a representative of the Bar of Montreal, and by a member of the Court.

GEO. M. HOGAN, Secretary.

Books Received

The following books have been received: Reports of Alabama State Bar Association, 1921; Proceedings of Kentucky State Bar Association, 1921; Report of 27th Annual Session of Georgia Bar Association, 1920; Reports of North Carolina Bar Association, 1920-1921; First Century of the Bench and Bar of Maine, Maine State Bar Association, 1920-1921; Report of Illinois State Bar Association, 1921; Proceedings of 11th Annual Meeting of Nevada State Bar Association, 1921; Report of the Association of the Bar of the City of New York, 1921; Report of the Wyoming State Bar Association, 1921; Report of Connecticut State Bar Association, 1921; 14th Annual Session of Florida State Bar Association, 1921.

LETTERS FROM BAR ASSOCIATION MEMBERS

Reply to Prof. Wigmore's Criticism of Committee Report

New York, Nov. 23.—To the Editor: Prof. Wigmore's criticism (October JOURNAL, p. 559) of the report submitted to the 1921 Meeting of the Association by the Committee on Noteworthy Changes in Statute Law, is more emphatic than helpful. The Committee, commenting on the 1920 Revision of the Articles of War, said:

> (4) Article 43 of the 1916 Revision gave to the majority of the court power to convict, except of a crime for which the death penalty is mandatory. This was the first statutory recognition of the right of the majority to convict and punish for crimes which only a unanimous verdict can convict and punish in the civil courts (p. 110 of the pamphlet containing the Committee Reports of the Association).

Prof. Wigmore complains that the 1916 Revision did not "give" this power to the court-martial majority. It may have been the "immemorial practice" prior to 1916 for a majority of the court to impose even a life sentence, but what our report clearly stated was that the 1916 Revision contained the first "statutory recognition" of such a power. The Committee's statement is entirely accurate. That the "statutory recognition" of the power of the majority of the court-martial to convict the accused was of some importance, is indicated by the fact that the 1920 Revision abolished sentences by the majority and substituted a requirement of a two-thirds vote for sentences up to ten years and a three-fourths vote for sentences from ten years to life.

Again the Committee said:

> (5) Article 47 of the 1916 Revision by a slight change in phraseology established for the first time the power of the appointing authority to set aside an acquittal or not guilty verdict by a court-martial. Previous to this revision the appointing authority could set aside a sentence imposed on a verdict of guilty; but he had no power to change a verdict of not guilty. This important change was accomplished by adding to the pre-existing law, which authorized the setting aside of a sentence, the word "finding." The result, whether or not intended, was that the power to set aside the finding carried with it the power to annul an acquittal, and this power was exercised during the war and gave rise to some of the most vigorous criticisms of the operations of our courts-martial.

Prof. Wigmore says this is not correct and that "there never has been in the appointing or convening authority any power 'to set aside acquittals' either in 1916 or at any other time; therefore, it could not have been taken away." Prof. Wigmore refers to a Senate Document in "refutation" of the Committee's statement. In that document the Judge-Advocate-General explained to the Senate Military Affairs Committee that under Art. 47 of the 1916 Revision the commanding officer would have power "to approve or disapprove the findings upon which the sentence is based." Nothing in that Document, except the phraseology of Art. 47, tended to suggest the prior existence of, or an intention to create power in the commanding officer to disapprove a court-martial finding of "not guilty." Nevertheless, Art. 47 contained this power in the provision: "The power to approve the sentence of a court-martial shall be held to include . . . (a) the power to approve or disapprove a finding." Here was power to disapprove a "finding" where previously there was power only to disapprove a "sentence." Despite Prof. Wigmore's declaration that it never existed, this power of the commanding officer to "disapprove a finding" was used during the war to disapprove findings of "not guilty." Whatever the theory upon which Prof. Wigmore justifies his declaration that the power to set aside acquittals never existed, the fact is that after a court-martial which heard the accused and witnesses had rendered its verdict of "not guilty," the camp commander ("convening authority") who took no part in the trial might disapprove that finding and require a reconsideration. The consequences to the accused are illustrated by a case with which Prof. Wigmore is familiar. A private at Camp Gordon (Record 110595) was accused of burglary. He was tried by a general court of thirteen members on Jan. 24, 1918. The findings of the court were "of the specification, not guilty; of the charge, not guilty; and the court does, therefore, acquit the accused." The commanding officer disapproved these findings and wrote on the record "these facts raised the presumption that the accused broke a window, an unexplained act, to say the least, very incriminatory." The court thereupon reconvened and without further testimony found the accused guilty and sentenced him to dishonorable discharge, forfeiture of pay, and five years' imprisonment. The sentence was approved by the commanding officer. The Judge-Advocate-General's office reviewed the record and summed up its opinion in the words: "After a careful consideration of the evidence, this office is firmly convinced of the absolute innocence of the accused." Nevertheless the commanding officer adhered to the finding of guilty and the sentence was executed. Does Prof. Wigmore believe that a verdict of acquittal was not set aside in this case?

The final stages of this case are interesting. It has figured in the criticism by officers of this Association of the operation of the courts-martial under the 1916 Revision. The Judge Advocate in a letter to the Secretary of War, dated March 10, 1919 (this letter was prepared by Col. Wigmore and in pamphlet form was given wide circulation), expressly referring to this case said:

> This case, therefore, instead of being as the critic had been led to believe an illustration of "the control which the military commander exercises over the administration of civil justice" illustrates exactly the opposite . . . The case is a good illustration of a feature in which the system of military justice sometimes does even more for the accused than the system of civil justice.

It is hard to believe that such a spirited defence of the administration of justice to the accused in this case could have been made in a letter dated March 10, 1919, in view of the fact that only a few days earlier the Judge Advocate had recommended that the accused, then in the penitentiary, be not only released, but restored to duty. On Feb. 12, 1919, the Judge Advocate in a memorandum to the Adjutant General had said:

> This office is strongly of the opinion that an injustice may have been done to this man and that it should be righted as far as possible.

Thus ended an interesting, but, from the point of view of the accused, an unfortunate illustration of the possibility under the Revision of 1916 "of disapproval of the findings," involving the setting aside of a verdict of acquittal.

Prof. Wigmore admits that he knows of fifty-six cases in which findings of not guilty were returned by the commanding officer for reconsideration, but he minimizes their importance because in only eighteen of

those cases was the judgment of acquittal revoked upon reconsideration and the accused found guilty.

Much depends on whether one considers these reversals of acquittals statistically or individually. One can review all the court-martial cases during the war and find perhaps satisfaction in the fact that there were only eighteen cases of verdicts of acquittal disapproved by a commanding officer and thereupon converted into verdicts of guilty with accompanying sentences, but one cannot review the record in the case to which I have called attention without a feeling that here was a serious and unnecessary failure of the law to protect the rights of the accused soldier.

The writer has no desire to prolong the court-martial controversy. The Revision of 1920 has "liberalized" the administration of military justice and brought it more in accord with the modern practice in the French and British armies. The "innuendo" which Prof. Wigmore finds in the Committee's report is nothing more than an effort to point out briefly something of the failure of the revisers of 1916 to foresee the necessity for the changes made by Congress in 1920 as the result of the test to which our military law was subjected during the war with Germany.

THOMAS I. PARKINSON.

"New Nationalism and Its Obligations"

Pocatello, Idaho, Dec. 7.—To the Editor: It is not easy to agree with Mr. Rhodes S. Baker in his apprehensions of danger from the encroachments of national sovereignty, as expressed in his very excellent article on "The New Nationalism and Its Obligations," in the November issue, although it may be admitted that in many respects the "national machinery groans under its over-load."

States rights have vanished during the past half century only to the extent that the people of the country have desired that they vanish. The Eighteenth Amendment registered the will of the vast majority of the people that the subject of prohibition should be transferred from the control of the several states to the sovereignty of the national government. The Mann act, while to a great extent covering a subject that could be and had been handled by the police power of the several states, has the unqualified sanction of the people. The Public Health Service would be continued as a national agency in a referendum vote of the people.

I question the accuracy of the statement that the people want and intend to have more local self-government. The trend of thought is toward more, rather than less, national control.

This is so because of the confusion, inefficiency, duplication of expense, and injustice resulting from the lack of uniformity of the laws of our forty-eight states. To a stranger within our gates, this lack of uniformity even in the fundamental laws of the various states presents not only an incongruity in government, but an absurdity.

A fugitive from justice is fleet enough to cross an imaginary boundary line between Indiana and Ohio before he is caught, and the pursuing sheriff from the former state is powerless to effect a legal arrest two feet over that precious line. Also, Indiana is powerless to compel his return from Ohio. A divorce may be granted for desertion in Oregon, but not in New York. Failure of a man to support his family is a crime here, but five miles south of here it is no offense. A doctor may be qualified to practice in California, but when he crosses a certain boundary line into another state he finds that he is no more qualified to apply his technical skill to relieve physical distress than the village plumber. It is because of these absurdities that the trend of thought is toward uniformity of conditions created by national legislation. Uniformity of laws through concerted action of the several states is admittedly out of the question.

There is no doubt that the national government has taken over more agencies than it has been able to effectively organize. It has not been able to assimilate the mass of detail involved in its increased scope of action. But this does not mean that the drift toward a more comprehensive national sovereignty is a danger. It merely means that the machinery of action should be improved, and that the processes by which national sovereignty is expressed should be better organized.

With the gradual elimination of class and sectional prejudices there has come about a greater desire for a more comprehensive national sovereignty. We cannot have a provincial idealism. We may have state pride, and city pride, and neighborhood pride, but our collective idealism contemplates national achievements and national progress. Collective advancement—the advancement of all our people—must inevitably become the concern, not of several states working in several directions, but of the national government working in one direction. Thus only can the ideals of the American people be realized.

C. M. BOOTH.

Jurisdiction of Courts in Federal Tax Cases Under Revenue Act of 1921

Washington, D. C., Nov. 26.—To the Editor: Two provisions of the Revenue Act of 1921 are of interest to all American lawyers who have occasion to advise clients in connection with the collection from the United States of taxes, penalties or interest paid to the United States under protest. These provisions are as follows:

> Sec. 1310 (c) Paragraph 20 of section 24 of the Judicial Code is amended by adding at the end thereof the following new paragraph:
>
> "Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any Internal-Revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the Internal-Revenue laws, even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead at the time such suit or proceeding is commenced."
>
> Sec. 1324 (b) Section 177 of the Judicial Code is amended to read as follows:
>
> "No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except that interest may be allowed in any judgment of any court rendered after the passage of the Revenue Act of 1921 against the United States for any internal-revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority, or any sum which was excessive or in any manner wrongfully collected, under the internal-revenue laws."

The first of these sections is an effort by the Congress to cure the defects existing in the law pointed out by the Supreme Court of the United States in Julius I. Smietanka, Collector, etc., v. Indiana Steel Company, decided October 24, 1921, and not yet reported in the advance sheets.

The effect of this decision is that no suit may be brought against the successor of the Collector of In-

ternal Revenue who first collects the taxes. In its opinion the Court states:

> No different conclusion results from the Act of February 8, 1919, c. 121, 30 Stat. 822. That is a general provision that a suit by or "against an officer of the United States in his official capacity" should not abate by reason of his death, or the expiration of his term of office, etc., but that the Court upon motion within twelve months showing the necessity for the survival of the suit to obtain a settlement of the question involved, may allow the same to be maintained by or against his successor in office. Whether this would apply to a suit of the present kind is at least doubtful.

The result of this decision is that no suit will be against the successor of a collector for taxes collected by the first collector and while upon the death of a collector, a suit pending against him at the time of his death can probably (as stated by the Court in the Smietanka case) be revived against his personal representatives, it is at least doubtful whether the provisions of Sec. 989 R. S. for certification for an appropriation would apply to a suit so revived.

The effort of Congress to remedy this defect by giving the District Courts jurisdiction where the claim exceeds $10,000 is granted only in the event of the *death* of the collector who has collected the tax and is very negligible relief in view of the present large overturn in the personnel of collectors throughout the country. Those serving under the last administration have collected the tax and those appointed under this administration cannot be sued and the taxpayer can sue in the District Court for an amount in excess of $10,000 only if the original collector has died.

The effect of all this is to make of the Court of Claims the only safe place in which to bring suit to recover a tax.

The District Courts have had concurrent jurisdiction with the Court of Claims of claims against the United States of matters involving not more than $10,000, but there is no appeal from the District Courts to the Supreme Court of the United States and a writ of error will lie only if there is a constitutional question involved. If there is no constitutional question, then the appeal is to the Circuit Court of Appeals.

There has always been an advantage in bringing suit in the Court of Claims because of the fact that if the amount involved is over $3,000 there is a direct appeal to the Supreme Court. There has always been the disadvantage in bringing suit in the Court of Claims that no interest was allowable upon a judgment recovered against the United States. This defect, however, is cured by the provision quoted above from the Revenue Act of 1921, and today suit can be maintained in the Court of Claims with a right to recover interest from the date the tax was paid, upon the amount recovered in the suit, and with the right of direct appeal to the United States Supreme Court.

It is surprising that so few lawyers realize that the Court of Claims has jurisdiction against the United States for the refund of taxes. It is true that there was for a long time a doubt about this jurisdiction and in the Nichol case, 7 Wall., the Court held that suit could not be brought in a customs case. This was long prior to the so-called Tucker Act of March 3, 1887, but this question is for all times settled by the decision referred to in the Smietanka case by Mr. Justice Holmes of U. S. v. Emery, Bird, Thayer Realty Co. (237 U. S. 28).

Fortunately the Court of Claims is right up with its docket and is now composed of a group of strong lawyers who have already given much attention to tax matters.

FRANK STEELE BRIGHT.

Jurisdiction of Aviation

Santa Fe, N. M., Oct. 11.—To the Editor: In the September issue of the JOURNAL, beginning at page 480, you have a report of the discussion of aviation, in which I notice that there is some suggestion that jurisdiction of aerial communication would properly lie in admiralty, but I cannot see any foundation for such a suggestion. Also something was said about the necessity, or at least advisability, of a constitutional amendment to enable Congress to legislate on the subject.

The surprising thing is that no one seems to have considered the obvious application to this subject of the congressional power to regulate commerce with foreign nations and among the several states. No elaborate statement is needed to show that almost everything connected with aviation would fall within the accepted definitions of what is such commerce. I am unable to see how there can be any reasonable doubt of the power of congress to legislate with regard to aviation as it has legislated upon subjects of intercourse and traffic between the citizens of the several states.

I merely desire to suggest to you that this view of the subject might be made the foundation for your consideration editorially in some future issue of the JOURNAL.

FRANK W. CLANCY.

Lord Bryce and the American Judiciary

Denver, Col., Nov. 3.—To the Editor: The call to the American Bar, in the address of Mr. Guthrie, read at the Cincinnati meeting, to defend our country's judiciary against the indictment quoted in the article from Lord Bryce's "Modern Democracies," should not remain unanswered.

Born, reared, and prepared for the bar in New Jersey, where judges are appointed, my professional life has been spent in Colorado, where judges are elected. I brought with me to Colorado a very strong pre-disposition towards filling judicial office by appointment, a strong prejudice against the elective system, and a suspicion that judges chosen by that method would probably prove less learned, and certainly more susceptible to unjudicial influences.

The District Court is our court of general, unlimited civil and criminal jurisdiction. In 1879 Colorado was divided into four judicial districts, and there were four district judges to do the entire judicial work of the state—civil and criminal, law and equity. The County Court, as now, had jurisdiction of all matters of probate, and of civil actions where the amount or value in dispute did not exceed $2,000, of misdemeanors, and of appeals from Justices of the Peace, but an appeal lay from the decisions of the County Court in civil actions, and in probate matters as well, to the District Court. Justices of the Peace had jurisdiction up to $300.

The Second District included Denver, and the greater part of the state North of the Arkansas-Platte Divide. I found presiding in the District Court in Denver, a native of Pennsylvania who had come to the bar in that state; he had been a soldier of that state in the Civil War. He had been elected Judge of the Second District after a bitter campaign, in which, in addition to the charge that he was a "new-comer,"—this in a community in which no one had lived as long as twenty years,—it was charged that he was ignorant of the law. He was

afterwards unanimously re-elected District Judge, and after some ten years on the district bench, was elected Justice of the Supreme Court.

I can say of this judge that no comparison fairly made between him and the learned justices of the Supreme Court of New Jersey, who were presiding at *nisi prius* when I left there, would be to his disadvantage.

Colorado now has fourteen judicial districts, instead of four. Denver, a district by itself, has five judges. Several other districts have two judges each. One hundred and twelve judges, including those now in office, have sat upon the district bench of the state during my residence in Colorado. I have practiced before just about one hundred of them, and I have known them all well enough to be able to speak of them as I do. Quite a number of them, by reason of vacancies through death, resignation, and by reason of the creation of new districts, have been appointed by Governors. I know I voice the practically unanimous sentiment of those members of the bar whose experience covers the field when I say that if there be any difference, the judges elected by the people average a little higher than the judges appointed. Of this one hundred and twelve, a few have been weak, and few—a very, very few—have undoubtedly been corrupt.

I do not undertake to speak by the book, but I doubt if out of this number charges of corruption have been made, or suspicions of corruption worthy of consideration whispered, exceeding in proportion similar charges and whispers against Federal judges during the same period.

From the district bench fifteen of the twenty-six justices of the Supreme Court who have held office during the same period, have been selected,—all but one by the people. Several Supreme Court judges have been appointed to *interim* terms. Here again the people have uniformly selected more wisely than Governors. The single appointee for a short term, was not re-elected. Six out of seven of the present bench of the Supreme Court were chosen by the people from the district bench.

As this is being written, word comes that the President has appointed Honorable Robert E. Lewis, United States District Judge for Colorado, to the bench of the Circuit Court of Appeals of the Eighth Circuit, to succeed the late Judge William C. Hook. Judge Lewis was a Colorado District Judge, chosen by the people, when appointed Federal Judge by President Roosevelt. Had the people not called him to the State Bench it is practically certain that he would not have been chosen to either Federal bench.

We have had some experiences in Colorado which enable us to make comparison of the relative merits of the appointive and the elective systems. This comparison results in the inevitable conclusion that there is nothing infallible about the appointive system. Judges appointed will be better or worse, largely as the appointive power shall be governed solely by consideration of public welfare, or shall yield to considerations of supposed party welfare.

We had a Commission, to help out the Supreme Court, for a number of years. The salary of the commissioners was identically the salary of the judges. Two-thirds of the first set of commissioners ranked with the then Justices of the Supreme Court. The other third were below par, and below any standard ever created by the people's selection. The second set of commissioners, appointed by another Governor, were high-class lawyers. They averaged higher in standing at the bar than most of the judges chosen to that bench by the people had attained at the time of their election: our experience has demonstrated another thing; that it is not absolutely necessary that a lawyer shall have achieved a great reputation or great practice in order to make a capable and clean judge.

We have had two Courts of Appeal—courts of intermediary appellate jurisdiction. They existed at different periods; their reports, however, run in consecutive order. It is practically a uniform experience to hear lawyers citing cases from these reports emphasize the fact that the decision cited was by the First Court of Appeals, if such be the fact.

The first bench of that court was made up of the last Commission—the one which, as I stated, consisted of lawyers who had acquired leading places at the bar, and this character was kept up. The other court, appointed years afterwards by a politician, was always ranked by the first court in the opinion of the bar, and I doubt if any one judge of this last court can be found who will claim that at any one time in its history his four colleagues ranked any equal number of judges of the Supreme Court chosen by the people.

The fact is that just as juries, in the average, strive to arrive at justice, so do communities and people strive to select good men to administer justice. Juries make mistakes, but judges also make mistakes. Who shall say whether judge or jury is proportionately oftener in the right? The people make mistakes, the appointing power makes mistakes. Clearly, in this matter, the appointing power should be oftener in the right, but it is our experience in Colorado that it hasn't been.

T. J. O'DONNELL.

Distribution of Wealth in America

Lewiston, Idaho, Sept. 8.—To the Editor: Mr. Everett P. Wheeler and Professor James H. Tufts have touched an interesting topic in their discussion of the distribution of wealth in America. Public discussion of this question will be beneficial on account of the vast amount of misinformation which is now prevalent.

For years the Socialists and folk of that kind have circulated the statement that one per cent of the people own ninety per cent of the wealth. Purporting to be based on authority, this statement has, by frequent repetition, secured credence. More recently, W. I. King, basing his conclusions upon partial investigations, has declared that sixty per cent of the wealth is in the hands of two per cent of the population.

There has never been any such general and comprehensive survey of the distribution of wealth in America as would warrant an exact statement in this regard. Mr. King's conclusion is open to criticism on account of the meagreness of the data upon which it is based. Neither the probate records nor the tax rolls afford sufficient basis for a final conclusion upon the distribution of wealth. The probate records are defective because of the prevalent custom of depreciating the values of estates on account of inheritance taxes; because many small estates, consisting of personal property, are divided without probate; because many estates are distributed in whole or in part prior to death; and because

small estates are quite commonly disposed of by conveyances deliverable at the death of the owner. The tax records are not reliable both because of the depreciation of values and because of exemptions of large classes of property, such as mortgages, government securities, and, in many States, corporate stocks.

Nevertheless, the income tax returns, probate records, tax rolls, and other sources of information afford fair basis for the inference that the statement that fifty per cent of the wealth of the country is owned by two per cent of the people is somewhere near accurate.

But this statement does not imply such a startling inequality in the distribution of wealth as at first appears. Two per cent of the people is something over two million, and it is less shocking to say that half the national wealth is in the hands of two million people.

The effect of this conclusion is also modified by an analysis of the population. Ordinarily, criminals, insane and incompetent persons, and infants are not expected to own property. In the case of families, quite commonly the title to property is vested in the head of the family. There are something more than twenty million heads of families in the United States who might normally be expected to be property owners, and it is still less startling to state that one-half of the wealth of the country is owned by ten per cent of those who might ordinarily be expected to own it.

There is some consolation, too, in the reflection that several devices have been developed the incidental tendency of which is to equalize the distribution of wealth. The income tax, the inheritance tax, and insurance may be mentioned among such devices.

In any event, it is important that there should be general understanding that the inequality is not so great as it at first appears, and that there is no panacea for such inequality as exists. The cure lies in popular education, in the development of habits of industry and thrift, and in the maintenance of equality of opportunity, so far as that is practicable.

EUGENE A. COX.

Uniformity of State Laws

Muskogee, Okla., Sept. 30.—To the Editor: May I have a word in the JOURNAL?

In the September issue of the JOURNAL you have a report of the meeting of the American Bar Association, and from this report it seems that the Commissioners on Uniformity of State Laws are considering the whole field of legislation.

I would like to know from whence comes the demand for Uniformity of State Laws; what class of citizens are demanding Uniformity of State Laws; what class of business is suffering for the lack of Uniformity of State Laws?

Does not the Constitution of the United States give Congress enough authority to legislate on all subjects where Uniformity is necessary? I think so. Do not the different conditions in the different parts of the United States, the different classes of citizenship, the character of business, etc., demand laws in conformity to those environment?

If the ideas of the Commissioners on Uniformity of State Laws must prevail why not have them consider the matter of abolishing State lines and at once end the trouble? Why not do away with our dual system entirely and have no laws but National, and no Courts but National Courts?—for there is where the Commissioners are leading us.

ARCHIBALD BONDS.

Meeting of Criminal Law and Criminology Institute

BY ROBERT H. GAULT

The thirteenth annual meeting of the American Institute of Criminal Law and Criminology was held at the Gibson Hotel in Cincinnati on November 18th and 19th. The proceedings of the meeting in full will be published in the Journal of the Institute. The President, Hugo Pam, Judge of the Superior Court of Cook County, presided. The outstanding features of the sessions were as follows:

A report by the Chairman of the Committee on Criminal Records and Statistics, Dr. Horatio M. Pollock of Albany, New York, Statistician for the New York State Hospital Commission. Assisting him in the conference upon the subject matter of his report were Colonel Henry Barrett Chamberlin, Operating Director of the Chicago Crime Commission, and Mr. Joseph A. Hill, Assistant Director of the United States Census Bureau. The Committee is endeavoring to arrive at a practical plan for maintaing records and building up reliable statistics of crime. Colonel Chamberlin described the records of the Chicago Crime Commission and Mr. Hill spoke to the question how cooperation can be secured betwixt state and municipal bureaus of records and the United States Bureau of the Census.

Professor Edwin R. Keedy of the Law School of the University of Pennsylvania reported for his Committee on Insanity and Criminal Responsibility. In the conference on this subject he was assisted by Dr. Alfred Gordon of Philadelphia.

Professor Robert W. Millar of the Northwestern University Law School, Chairman of the Institute Committee on Modernization of Criminal Procedure, was assisted in his conference by Lt. Col. Rigby of the Judge Advocate's Department, and Judge Quincey A. Myers, former Chief Justice of the Supreme Court of Indiana, Indianapolis.

Mr. James Bronson Reynolds of New York City, Chairman of the Institute Committee on Public Defender, spoke on Social Reconstruction and the Criminal Courts. Mr. Louis Fabricant of New York City, Counsel for the Voluntary Defenders Committee of that city, spoke of the Public Defender as collaborator with the Public Prosecutor.

The following officers were elected: President, Mr. James Bronson Reynolds, North Haven, Conn.; Vice-Presidents, Professor Edwin R. Keedy, Law School, University of Pennsylvania, Philadelphia, Pa.; the Honorable Quincey A. Myers, Indianapolis, Ind.; Honorable Floyd E. Thompson, Rock Island, Illinois. Members of the Board: Nathan William MacChesney, Chicago; Honorable Charles W. Hoffman, Domestic Relations Court, Cincinnati; Dr. Herman M. Adler, Institute for Juvenile Research, Chicago; Dr. F. Emory Lyon, Central Howard Association, Chicago.

MISCELLANY

Brief contributions of legal anecdotes, legal curiosities of all kinds, and other matters likely to afford variety and interest to a department of Miscellany are invited from the readers of the Journal.

Ex-Senator Lewis' Bon Mot

Ex-U. S. Senator Jas. Hamilton Lewis, referring to the presence of the great number of judges of the Israelite faith among the jurists in attendance at the Chicago Bar Association's dinner to President Severance of the American Bar Association, genially said:

"The future of the law is now more secure than at any time in history. Here is Judge David, Judge Fisher, Judge Sabath, Judge Friend, Judge Pam, Judge Horner, of the State courts, reinforced by Judges Alschuler and Mack of the Federal Court;—surely all's well with the law now, so fixed in **Jewish-prudence.**"

A Question of Finger Prints

There is a popular impression that no two finger prints made by different persons are ever alike. Answering a question on this point at the recent meeting of the section on Criminal Law at Cincinnati, Mr. Milton Carlson, of Los Angeles, said in the course of his remarks:

"I doubt that, for this reason: Those who are mathematicians and arithmeticians here, let's figure just a moment. A finger print occupies an area of approximately one-half a square inch. Take your own index finger, touch a pad and put it on a piece of paper, and if you measure it you will find that it occupies approximately half a square inch. Then count the lines across from top to bottom and from left to right. There are never as few as ten and never as many as forty. Therefore, 25 would be an average approximately. Now, there are 25 lines from top to bottom and from left to right, and you are given a limited area of approximately half a square inch, or whatever it might be. Now we count the number of lines and endings, whether abrupt endings, etc., by which we identify finger prints. Being a limited area to begin with and a limited number of lines within that area, there must be essentially a very quick limitation."

Dissenting Opinions

(Contributed)

The late Chief Justice Peters of the State of Maine served on the bench of the Supreme Court with great distinction for at least twenty-five years and for a large part of that time as its Chief Justice. Perhaps it would be an exaggeration to say that he was the greatest judge of that Court; at the same time none was ever more beloved, honored or esteemed by the Bar and the people of the State. At the termination of twenty-five years of service he resigned from the Bench and was tendered a complimentary dinner by the Bar. On this occasion, in response to toasts in his honor, he stated the fact to be that in his entire service on the Bench he had never written a dissenting opinion; that he concluded that if he could not persuade his brethren of the correctness of his view, perhaps they were right, and that no advantage would be subserved by his expressing his dissent from the majority opinion.

One of the associates of the Supreme Court who served with the Chief Justice for many years was the late Chief Justice Emery, and they were both at one time members of the Board of Trustees of Bowdoin College, Brunswick. After Chief Justice Peters' death, Chief Justice Emery's attention was called to the statement made by Judge Peters as to never having filed a dissenting opinion. Chief Justice Emery said he did not recall whether or not that was the fact, but he did know that when this Board of Trustees was good enough to vote him an honorary LL.D., Judge Peters, who was present at the Board meeting, said: "Emery, this degree is wrong. It shouldn't be LL.D; it should be D.D.—Damned Dissenter!"

On the subject of dissenting opinions Lord Brougham says in his Historical Sketches of statesmen of the time of George III, in referring to Mansfield's thirty-odd years of service as justice of the Court of Kings' Bench: "For nearly thirty years there were not more than a half dozen cases in which the judges differed."

"Lying Like Truth"

"If, with intent to lead the plaintiff to act upon it, they put forth a statement which they know may bear two meanings, one of which is false to their knowledge, and thereby the plaintiff putting that meaning on it is misled, I do not think they can escape by saying he ought to have put the other. If they palter with him in a double sense, it may be they lie like truth; but I think they lie, and it is a fraud. Indeed, as a question of casuistry, I am inclined to think the fraud is aggravated by a shabby attempt to get the benefit of a fraud without incurring the responsibility."—From the Judgment of Lord Blackburn in Smith vs. Chadwick (9 App. Cas. 187).

Nolens Volens

A New York silk merchant went to the bank to get his note renewed.

"I am sorry," said the banker, "but it will be absolutely impossible for me to renew your note."

The silk merchant's face paled. After a moment of thought he looked up at the banker and asked:

"Were you ever in the silk business?"

"Why of course not," answered the banker.

"Well, you're in it now," said the silk merchant as he picked up his hat and went out.—*Cincinnati Enquirer.*

The Pioneer's Influence on Law

"Reviewing the influence of the pioneer upon our law, it may be conceded that we owe not a little to the vigorous good sense of the judges who made over the common law of England for our pioneer communities," said Prof. Roscoe Pound of Harvard, in an address to the N. C. Bar Association in 1920. "Science might have sunk into pedantry where strong sense gave to America a practical system in which the traditional principles were made to work in a new environment. On the other hand this rapid development of law in a pioneer environment left a bad mark on our administration of justice. The descendants of the frontiersman have been slow to learn that democracy is not necessarily a synonym of vulgarity and provincialism; that the court of a sovereign people may be surrounded by dignity which is the dignity of that people; that order and decorum conduce to the dispatch of judicial business, while disorder and easy-going familiarity retard it; that a counsellor at law may be a gentleman with fine professional feelings without being a member of a privileged caste; that a trial may be an agency of justice among a free people without being a forensic gladiatorial show; that a judge may be an independent, experienced, expert specialist without being a tryant. In the federal courts and in an increasing number of the states something has been done to secure the dignity of judicial tribunals. But the country over there is still much to do. Not the least factor in making courts and bar efficient agencies for justice will be restoration of common-law ideals and deliverance of both from the yoke of crudity and coarseness which the frontier sought to impose on them."

Watching His Chance

At the annual banquet of the State Bar Association of Connecticut at New Haven this year, Toast Master A. Heaton Robertson said:

"Now, if I get talking I will not give a chance for the other speakers. I remember being at the University Club in New York one night and in this club there was a man by the name of Gordon McCabe. He had been a Captain of Artillery in the Confederate Service and was quite a pleasing after-dinner speaker. He talked at the University Club and made a pleasing address, and afterwords we gathered around the table. Old Ike Bromley was there. McCabe was talking and told story after story. Ike Bromley was a pretty good talker himself. I had a sneaking feeling that Connecticut ought to show up and I turned to the old man and said, 'Mr. Bromley, why don't you say a word?' He said, 'Robertson, if that fellow ever stops to spit he is lost.'"